IN THE

Supreme Court of the United States Michael Rodak, Jr., clerk

OCTOBER TERM, 1979

SEP 14 1979

No. A-1105

IMPERIAL IRRIGATION DISTRICT, ET AL., Petitioners,

BEN YELLEN, ET AL., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner Imperial Irrigation District ("the District") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

The Court of Appeals' decision as to the powers and duties of the Secretary of the Interior in the administration of the Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. § 617 et seq., is in serious conflict with the opinion and decrees of this Court in Arizona v. California, ordering the satisfaction of water rights per-

fected under state law prior to the effective date of the Project Act, and determining their quantities and priorities.

This Court has directed that the Secretary shall so operate Hoover Dam and the All-American Canal as to deliver water in satisfaction of rights in Colorado River water which were perfected under state law prior to enactment of the Project Act. It has further determined that, in the case of Imperial Irrigation District, the area so irrigated (for at least 50 years now) is 424,145 acres, and that the quantity of water diverted, under appropriations made at least 78 years ago, was 2,600,000 acre-feet annually at the time when the Project Act became law. This water is now supplied by the United States through the All-American Canal, pursuant to the Project Act.

But the Court of Appeals' decision, if allowed to stand, would have the effect of requiring the Secretary to reduce his deliveries to the District to far less than 2,600,000 acre-feet per year, for the irrigation of much less than 424,145 acres. This is because he is told to refuse to deliver water for the irrigation of land in excess of 160 acres per landowner, unless the owner agrees to sell at prices fixed by the Secretary of the Interior. (See the Appendix at p. 244a for the affidavit of the principal respondent, a potential buyer, which gives an idea of the windfall he is expecting.) The court quotes an estimate that 233,000 acres are in this category. It concedes that the Secretary cannot compel the landowners to sell (and neither can the District), but believes that many will do so.

The Court of Appeals believes that under California law the landowner has no vested right appurtenant to

the land (we think that this conflicts not only with California law but also with § 8 of the Reclamation Act of 1902), and therefore the District can "redistribute" the water taken away from lands that were irrigated before there was a Project Act. Aside from the legal barriers to doing so, there is no place where the District can put any of the water so "redistributed," because all irrigable land in the District is already being watered.

The Court of Appeals' decision would not only overturn 34 years of administrative practice, during the administrations of six successive Secretaries of the Interior, and four Presidents, to the effect that the excess land restrictions in the reclamation laws do not apply to present perfected rights under the Project Act; it would also overturn the Department's more general practice throughout the 17 Western States, adhered to until recently, that § 8 of the Reclamation Act of 1902 requires that water be permitted to "flow through" reclamation works to supply water rights previously vested under state law, irrespective of acreage.

OPINIONS BELOW

The principal opinion of the Court of Appeals is reported at 559 F.2d 509 (9th Cir. 1977), and is reproduced in the Appendix at p. 1a. The opinion of the Court of Appeals modifying its principal opinion and denying the District's petition for rehearing is reported at 595 F.2d 524 (9th Cir. 1979), and is reproduced in the Appendix at p. 64a. The opinion of the District Court is reported at 322 F. Supp. 11 (S.D. Cal. 1971), and is reproduced in the Appendix at p. 78a. The order of the District Court denying the mo-

tion of respondents for leave to intervene after judgment to prosecute an appeal is unreported and is reproduced in the Appendix at p. 112a. The decision of the Court of Appeals reversing that order of the District Court is an appendix to the opinion of the Court of Appeals, 559 F.2d, at p. 543, and is reproduced in the Appendix at p. 62a.

JURISDICTION

The judgment of the Court of Appeals was entered August 18, 1977, and was subsequently modified by an order entered April 23, 1979, which denied the District's petition for rehearing. On July 3, 1979, Justice Rohnquist granted an extension of time to September 14, 1979, in which to file this petition for certiorari. The jurisdiction of the Supreme Court is invoked under § 1254(1) of the Judicial Code, 62 Stat. 928.

QUESTIONS PRESENTED

1. Whether the Boulder Canyon Project Act and this Court's decree in Arizona v. California require the delivery of water in satisfaction of "present per-

The 1979 decree, — U.S. —, 99 S. Ct. 995, entered pursuant to stipulation among the United States, Arizona, California, Nevada, and a number of California parties, including the District, adjudicated "present perfected rights" of specified entities in the three States. The District's present perfected rights were stated as follows:

[&]quot;The Imperial Irrigation District in annual quantities not to exceed (i) 2,600,000 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901." Id., at —, 99 S. Ct., at 1000.

fected rights" on privately owned lands in excess of 160 acres?

- 2. Whether principles of finality preclude the reversal of administrative and judicial determinations that vested water rights are not subject to impairment by the excess land provisions of the reclamation law?
- 3. Whether an alleged "desire" to buy land at less than its market value at prices to be fixed by the Secretary of the Interior under § 46 of the Omnibus Adjustment Act of 1926 creates standing to intervene and to appeal from a district court judgment against the United States from which the United States did not appeal? And, if so, whether such standing ceases upon the termination of the Secretary's authority to fix prices for excess lands, during the pendency of the appeal?

² The 1964 decree in Arizona v. California, 376 U.S. 340, defines "perfected rights" and "present perfected rights" as follows:

[&]quot;(G) 'Perfected right' means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use;

[&]quot;(H) 'Present perfected rights' means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act" Id., at 341.

³ See the determination of Secretary of the Interior Ray Lyman Wilbur, reproduced in the Appendix at p. 213a.

⁴ See the findings of fact, conclusions of law, and judgment of the Superior Court of the State of California in the in rem validation proceeding, *Hewes v. All Persons*, reproduced in the Appendix at p. 120a. See the Appendix at p. 247a for the administrative practice of the Interior Department from 1931 to 1967.

⁵ Section 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 649, as amended, 70 Stat. 524, 43 U.S.C. § 423(e), under which this

STATUTORY PROVISIONS INVOLVED

Relevant extracts from the statutes and compact involved are printed in the Appendix beginning at page 155a. They are:

- Boulder Canyon Project Act, 45 Stat. 1057, §§ 1, 4(a), 4(b), 5, 6, 8, 9, 12, 13, 14 and 18, 43. U.S.C. §§ 617, c(a), c(b), d, e, g, h, k, l, m, and q.
- Colorado River Compact, 70 Cong. Rec. 324 (1922), Art. VIII, H Doc. 717, 80th Cong., 2d Sess., p. A19.
- Colorado River Basin Project Act, 82 Stat. 885, § 301(b), 43 U.S.C. § 1521(b).
- Act to Provide for the Application of the Reclamation Law to Irrigation Districts, 42 Stat. 541, § 1, 43 U.S.C. § 511.
- Reclamation Act of 1902, 32 Stat. 388, §§ 3, 5 and 8, 43 U.S.C. §§ 372, 383, 392, 416, 431, 432, 434, and 439.
- Omnibus Adjustment Act of 1926, 44 Stat. 636, as amended, 70 Stat. 524, § 46, 43 U.S.C. § 423(e).
- Judicial Code, 62 Stat. 689, § 1738, 28 U.S.C. § 1738.

action was brought, provides that "[U]ntil one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary . . . "More than one-half of the construction charges had been fully paid by March 1, 1978, while this case was being considered by the Court of Appeals, and the court was so advised. See the Appendix at p. 243a.

STATEMENT OF THE CASE

This suit was instituted by the United States against Imperial Irrigation District at the request of the Secretary of the Interior in 1967. The Secretary sought a declaratory judgment that the acreage limitation oprovisions of the reclamation law apply to privately owned lands in the District which receive Colorado River water through the All-American Canal. Relying particularly on § 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 699, as amended, 70 Stat. 524, 43 U.S.C. § 423e, he asserted authority to refuse delivery of water to such lands in excess of 160 acres per individual landowner, unless the land owner would agree to sell at prices fixed by the Secretary.

In bringing this action, the United States sought to reverse a determination made 34 years earlier by Secretary Pay Lyman Wilbur. During the negotiation of the contract between the United States and the District for delivery of water and repayment of the cost of the All-American Canal, Secretary Wilbur determined that

⁶ The term "acreage limitation" is a species of statutory limitation on the amount of irrigable land in single ownership that is eligible to receive project water from federal reclamation projects. Various statutes provide for acreage limitations in overlapping and sometimes inconsistent te.ms. These include: the Reclamation Act of 1902, §§ 3, 5, 32 Stat. 388-89 (1902), 43 U.S.C. §§ 416, 432, 434; Act of February 2, 1911, 36 Stat. 895, 43 U.S.C. § 374; Warren Act, § 2, 36 Stat. 926, 43 U.S.C. § 524; Act of July 24, 1912, 37 Stat. 200, 43 U.S.C. § 449; Act of August 9, 1912, § 3, 37 Stat. 266, 43 U.S.C. §§ 543, 544; Act of August 13, 1914, § 12, 38 Stat. 689, 43 U.S.C. § 418; Act of August 11, 1916, § 5, 39 Stat. 508, 43 U.S.C. § 627; Act of August 11, 1916, § 6, 39 Stat. 508, 43 U.S.C. § 628; Act of January 25, 1917, §§ 1-4, 39 Stat. 868; Act of May 20, 1920, 41 Stat. 605, 43 U.S.C. § 375; Omnibus Adjustment Act of May 25, 1926, 44 Stat. 649, 46 U.S.C. § 423e; and Act of October 14, 1941, 54 Stat. 1119, 16 U.S.C. § 590z-2(e) (5).

federal law does not authorize the application of acreage limitations to privately owned lands in the District having vested water rights. This determination was subsequently embodied in a formal ruling by the Secretary.' It was confirmed in a final judgment of a California state court of competent jurisdiction in proceedings to validate that contract. These validation proceedings were required by federal statute. 42 Stat. 541, 43 U.S.C. § 511. The District Court found that this ruling had been adhered to by six successive Secretaries in the administrations of four Presidents.*

John M. Bryant and certain other landowners intervened as defendants on their own behalf and as representatives of a class comprised of all persons (some 800 in number) owning more than 160 acres of irrigable land within the District.

Ben Yellen and the other individual respondents reside within the District but own no farmland. They allege a desire to buy land from the present owners at prices substantially below market values, and that they would be able to do so if the present owners were denied water from the All-American Canal unless they agreed to sell their excess lands at prices established

⁷ Secretary Wilbur's determination (reproduced in the Appendix at p. 213a), the validation proceedings (reproduced in the Appendix at p. 120a), and the administrative practice of successive Secretaries (see the Appendix at p. 247a) are reviewed in Part II of "Reasons for Granting the Writ."

⁸ The District Court identifies them as Secretary Ickes under Presidents Roosevelt and Truman; Secretaries Krug and Chapman under President Truman; Secretaries McKay and Seaton under President Eisenhower. It added: "During his tenure under President Kennedy, Secretary Udall did not disturb the interpretation." 322 F. Supp., at 26, n.30.

by the Secretary. Respondents do not allege that they have any statutory preference as against other potential purchasers, wherever resident, arising from respondents' residence in Imperial Valley. Nor do they allege that excess landowners can be compelled to sell, or that, if landowners do sell, they would be obliged to deal with respondents. Theirs is not a class action.

Historical Background

Imperial Irrigation District, an agency of the State of California, is located in the southeastern corner of California, adjacent to the Mexican border.

Irrigation commenced in Imperial Valley in 1901. The water was diverted from the Colorado River at a point in California, and transported via the privately owned Alamo Canal through Mexico and back into Imperial Valley. This water was delivered from the Alamo Canal through 1,700 miles of privately owned

⁹ Dr. Yellen filed an affidavit in the District Court in support of his motion to intervene in which he said:

[&]quot;5. If the Government had prevailed in this litigation, the Applicants and persons similarly situated would attempt to purchase the excess lands under the terms and conditions set by the Secretary of the Interior.

[&]quot;6. I am acquainted with the cost of land within the Imperial Irrigation District. Land that is without water has a market value and sells for approximately \$25.00 to \$50.00 per acre. Land that is irrigated with federal reclamation water by the Imperial Irrigation District has a value and sells for between \$1200.00 to \$1400.00 per acre." Record, p. 169-170. This affidavit is reproduced in the Appendix at p. 244a.

¹⁰ The history of irrigation in Imperial Valley is summarized in the District Court's opinion, 322 F. Supp., at 12-15, and in this Court's opinion in *Arizona* v. *California*, 373 U.S. 546, 553 (1963).

main and lateral canals to lands " in the Valley. These pre-1929 appropriations in Imperial Valley, and uses of water associated therewith, gave rise to the "present perfected rights" involved in this controversy.

Since 1942, all water delivered to the District has been delivered through the All-Américan Canal, constructed by the United States as a substitute for the Alamo Canal under the authority of the Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. §§ 617 et seq. This Act also authorized the construction of Hoover Dam and gave the consent of Congress to the Colorado River Compact, subjecting all rights of the United States and those claiming under it to the Compact. Section 6 of the Project Act expressly requires that the Secretary operate the project so as to satisfy present perfected rights. The Project Act makes no mention of acreage limitations on private lands, although it expressly limits entries on public lands to 160 acres. Section 14 incorporates by reference unspecified parts of the reclamation law, but such incorporation is specifically limited to the extent that it does not conflict with the express provisions of the Project Act.12 And the Project Act's legislative history, in which the sub-

These are the lands involved in this litigation. 233,000 acres, or 55 percent of the 424,145 acres irrigated prior to the Project Act, are said by the Court of Appeals to be owned by "excess landowners." 595 F.2d, at 530, n.6. Respondents do not allege that the present landowners are the same people who owned these lands in 1929, or that there has not been a "break-up" of large 1929 holdings, with subsequent sales and resales of acreage in various sizes.

^{12 &}quot;Sec. 14. This act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided (emphasis added)."

ject of acreage limitations played a controversial role, contains repeated statements by both proponents and opponents of the Λct to the effect that the language contained in § 14 does not incorporate the acreage limitation provisions of the reclamation law. See, e.g., Colorado River Basin: Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation, 69th Cong., 1st Sess., 32-33 (1926); S. Rep. No. 592, 70th Cong., 1st Sess., pt. 2, at 26 (1928); 69 Cong. Rec. 7634-7635, 9451, 10471, and 10495 (1928); 70 Cong. Rec. 289 (1928).

The Decisions Below

The District Court, after trial, entered judgment against the United States, holding that acreage limitations do not apply to private lands within the District. 332 F. Supp., at 11. Respondents applied for leave to intervene to appeal in the event the United States decided not to appeal. The District Court denied leave to intervene for this purpose, and the United States decided not to appeal. Solicitor General Griswold explained:

"I considered the matter carefully and thoroughly, and over a considerable period of time. As a result of my consideration, I became convinced that (a) we would not win the case in the court of appeals, and (b) we should not win it. In this situation, I came to the conclusion that it was my duty as a responsible officer of the government not to authorize an appeal." 117 Cong. Rec. 46228 (1971) (emphasis added).

Respondents appealed the order denying leave to intervene. In the meantime, respondents in a separate case obtained a District Court decision (by another judge)

that the "residency requirement" is of § 5 of the Reclamation Act of 1902 applies to lands within the District. Yellen, et al., v. Hickel, 335 F. Supp. 200 (S.D. Cal. 1971); 352 F. Supp. 1300 (S.D. Cal. 1972). There, respondents alleged that they would be able to buy land at below market value if the residency requirement of § 5 were applied. The Court of Appeals then reversed the order denying intervention in the present case on the basis that there might be two conflicting decisions in the Ninth Circuit. 559 F.2d, at 543.

The two cases ("residency" and "acreage") were calendared for argument before the same panel. Almost three and one-half years after argument, the Court of Appeals ordered dismissal of the residency case for lack of standing, but reversed the District Court's judgment in the acreage case as to both standing and the merits. 559 F.2d, at 509. Its rationale was that § 14 of the Project Act, by its references to the reclamation law, subjected all privately owned lands to the excess lands provisions of the reclamation law, identifying § 46 of the Omnibus Adjustment Act of 1926 as the operative statute. It held that the "present perfected rights" referred to in § 6 of the Project Act were rights of the District, not its landowners, and that the District could "redistribute" its water if excess landowners refused to sell at prices fixed by the Secretary of the Interior. As to standing, the court held that respondents' interest in buying land at less than market value was sufficient to create standing. Petitions for rehearing, filed in September of 1977, were denied 21 months later, in April of 1979. 595 F.2d, at 524. This

^{13 &}quot;[N]o such sale [of a right to the use of water for land in private ownership] shall be made to any landowner unless he be an actual bona fide resident on such land" 32 Stat. 389.

petition for certiorari follows. Respondents in this case have not filed a petition for certiorari in the residency case.

In Arizona v. California, 373 U.S. 546 (1963), this Court gave particular attention to the subject of "present perfected rights" (pp. 566, 581, 583, 584, 588, and 594), holding them to be excluded from the Secretary's power to allocate water under the Project Act. The Court, in its 1964 decree, 376 U.S. 340, defined the term (see n. 2, supra), and required the Secretary to so operate all federal works (e.g., Hoover Dam and the All-American Canal) as to satisfy them. In its 1979 decree, the Court determined the present perfected rights in Arizona, California and Nevada, including those of the District (see n. 1, supra). Their significance, in the present case, is that it has been adjudicated that 424,145 acres in the District (97 percent of the total area now irrigated) were being irrigated from the Colorado River some 50 years ago, before the enactment of the Project Act, and the Secretary is directed by this Court's opinion and decrees to deliver the water required to satisfy those rights. This acreage includes all of the excess lands involved in the present controversy.

The primary question now being litigated is whether the Secretary is empowered to refuse to deliver water from the All-American Canal for use on those lands, in excess of 160 acres per landowner, unless the owner agrees to sell the excess at prices fixed by the Secretary.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Conflicts With This Court's Opinion and Decrees in Arizona v. California

First, the Court of Appeals' decision cannot be put into operation without conflicting with this Court's opinion in Arizona v. California, supra," and its adjudication of the District's "present perfected rights" in the 1979 decree. Second, the Court of Appeals' decision conflicts with this Court's 1964 decree respecting allocation of water in the event of shortages.

A. As to "present perfected rights" decreed by this Court

"Present perfected rights" must be satisfied from water stored behind Hoover Dam. These rights, by definition, were perfected by actual use as of 1929 when the Project Act became effective. The 1979 decree fixes the amount of water which the Secretary must deliver to the District at 2,600,000 acre-feet year or enough water to irrigate 424,145 acres—whichever quantity is less—with a priority date of 1901. That is to say, all of the lands which would be denied water by the Court of Appeals have been irrigated for more than 50 years, pursuant to appropriations made 78 years ago.

¹⁴ The significance of "present perfected rights," as rights acquired under state law, not dependent upon or subject to reduction by the Secretary's allocations of water, received repeated attention in this Court's opinion in Arizona v. California, 373 U.S. 546, 566, 581, 583, 584, 588, 594 (1963). Thus, in rejecting the argument that appropriations under state law governed the Secretary's allocation of water, the Court said: "[W]e are persuaded that had Congress intended so to fetter the Secretary's discretion, it would have done so in clear and unequivocal terms, as it did in recognizing 'present perfected rights' in § 6." Id., at 581 (emphasis added).

The Court of Appeals says that the application of acreage limitations to privately owned lands in the District will not impair present perfected rights because the District can "redistribute its deliveries if certain lands became ineligible for delivery of water." 559 F.2d, at 529.

That statement is plainly wrong. The District cannot redistribute water within its boundaries for reasons both factual and legal. There is no place in the District on which to put water taken away from the "excess" acreage now irrigated. All irrigable private land— 438,000 acres—is already under irrigation (424,145 acres of this is in decreed present perfected rights).

The Court of Appeals makes two interlocking errors (i) in failing to recognize that under California law the rights of landowners to water delivered by irrigation districts are property rights, ¹⁶ not amorphous mem-

¹⁵ 233,000 acres, or 55 percent of the 424,145 acres irrigated prior to the Project Act, are said by the Court of Appeals to be owned by "excess landowners." 595 F.2d, at 530, n. 6.

¹⁶ The California Supreme Court has described the nature of California water rights owned by an irrigation district in trust for landowners as follows:

[&]quot;[T]he beneficiaries of the trust, who, upon familiar equitable principles, are to be regarded as the owners of the property, are the landowners in the district, with whose funds the property has been acquired (Civ. Code, § 853), and in whom, indeed, is vested by the express provisions of the statute, in each, the right to the several use of a definite proportion of the water of the district, and in all, in common, the equitable ownership of its water rights, reservoirs, ditches, and property generally, as the means of supplying water. St. 1887, pp. 34, 35, §§ 11, 13. Such rights as these cannot be distinguished in any way from other private rights, and therefore clearly come within the protection of the provision of section 13 of article 1 of the state Constitution—that 'no person shall be • • • deprived of • • • property without due process of law,' and

berships in a class; and (ii) in failing to recognize that under federal law the rights of landowners are rights which the Project Act directs the Secretary to serve, and precludes him from taking. This Court's two decrees in *Arizona* v. *California* implement that mandate.

The court's conclusion that the application of acreage limitations to individual landowners (as distinguished from the District) would not impair present perfected rights is premised on a misunderstanding of the nature of water rights "owned" by irrigation districts in California. Although it is true that the District holds the legal title to the water rights, it holds this title in trust for the landowners, who own the beneficial interest. It is the individual landowner—not the District—who puts the water to beneficial use. Under California law, each individual landowner has a statutory right to a definite proportion of the District's water. And each individual landowner has a statutory right to assign his proportionate share. Moreover, the right to

of the similar provision of section 1 of the fourteenth amendment to the Constitution of the United States." Merchants' National Bank of San Diego v. Escondido Irrigation District, 144 Cal. 329, 334, 77 P. 937, 939 (1904).

^{17&}quot; Basis of apportionment among landowners. All water distributed by districts for irrigation purposes shall except when otherwise provided in this article be apportioned ratably to each landowner upon the basis of the ratio which the last assessment against his land for district purposes bears to the whole sum assessed in the district for district purposes." Cal. Water Code Ann. § 22250 (West 1971).

¹⁸ "Assignment of right. Any landowner may assign for use within the district his right to the whole or any portion of the water apportioned to him pursuant to Section 22250." Id., at § 22251.

such proportionate share becomes appurtenant to the land on which the water is used.19

Section 6 of the Project Act requires the Secretary to satisfy present perfected rights, and § 13(d) provides specifically that the rights assured by the Colorado River Compact, e.g., present perfected rights, "run with the land," "and shall be deemed to be for the benefit of and be available to" the States of the Basin "and the users of water therein . . . by way of suit, defense, or otherwise, in any litigation respecting the waters of the Colorado River . . . "20

Present perfected rights are rights "acquired in accordance with state law." 376 U.S., at 341. Thus, the Project Act's mandate that present perfected rights be satisfied requires that in California such rights be satisfied with respect to individual landowners and their lands.

The notion that the District alone is protected against impairment of present perfected rights, and not the landowners who are the equitable owners of those rights under the laws of California, is also in collision with § 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. §§ 372, 383. Section 8 not only requires the Secretary to observe and respect rights vested under state law, but also, in its overriding pro-

^{19 &}quot;A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another." Cal. Civ. Code, § 662.

²⁰ "This section was re-enacted in the Boulder Canyon Project Adjustment Act, 54 Stat. 779, § 14 (1940).

viso, states a principle which is echoed, often in the same words, in the law of every Western State:

"[T]he right to the use of water . . . shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 21

In *Ickes* v. *Fox*, 300 U.S. 82 (1937), this Court rejected the notion that ownership of water rights vests in an appropriator who diverts, stores and distributes water for use by another.²² There, the United States was the

^{21 43} U.S.C. § 372. The only mention of § 8 in the Court of Appeals' opinion is in a footnote, 559 F.2d, at 528, n.37, which cites the dictum in Arizona v. California, 373 U.S. 546, 586-587 (1963), which this Court disavowed in California v. United States, 438 U.S. 645, 674-675 (1979), The Court of Appeals relies heavily on Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958), and Fresno v. California, 372 U.S. 627 (1963). This Court, in California v. United States, said that Ivanhoe, like Fresno, went "further than was necessary" in restricting the scope of § 8 of the Reclamation Act. 438 U.S., at 673. Mr. Justice Harlan, dissenting, in Arizona v. California, 373 U.S. 546, 623-624, criticized what he called the dictum in Ivanhoe "that § 8 applies only to the acquisition of rights by the United States and not to its operation of a dam," in terms which foreshadowed the later disavowal in California v. United States of that dictum, 373 U.S., at 586-587, Mr. Justice Harlan also made the point that § 14 of the Project Act, providing "that the Reclamation Act shall govern the operation of Hoover Dam except as the Project Act otherwise provides," had the effect of incorporating § 8 of the Reclamation Act into the Project Act. Id., at 623.

²² This Court said:

[&]quot;Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water-rights be-

appropriator, as the District is in this case, but the water right was held to run with the land, per § 8 of the Reclamation Act, and to be enforceable by the landowner. See Fox v. Ickes, 137 F.2d 30 (D.C. Cir. 1943). This Court cited Ickes v. Fox with approval in its opinion in Arizona v. California, supra, at 585, n.86, as establishing the criterion for operation of the Boulder Canyon Project.

Thus, the notion that the District alone is protected against impairment of present perfected rights, and not the landowners who are the equitable owners of those rights under the law of California, conflicts with both § 13 of the Project Act and § 8 of the Reclamation Act of 1902.²³

B. As to water decreed by this Court in addition to "present perfected rights"

Article II(B)(3) of the 1964 decree, 376 U.S. 340, directs the Secretary, in the event of shortage in the allocated quantities, to allocate the remaining available water among three states "after providing for satisfac-

came the property of the landowners, wholly distinct from the property right of the government in the irrigation works." 300 U.S., at 94-95.

²³ In *United States* v. Gerlach Live Stock Co., 339 U.S. 725 (1950), the Court said this about § 8 of the 1902 Act:

[&]quot;By its command that the provisions of the reclamation law should govern the construction, operation, and maintenance of the several construction projects, Congress directed the Secretary of the Interior to proceed in conformity with state laws, giving full recognition to every right vested under those laws." Id., at 734.

This is substantially the language of § 14 of the Project Act, relied upon by the Court of Appeals in reaching the opposite conclusion that vested rights in excess of 160 acres per landowner are not entitled to "full recognition."

tion of present perfected rights in the order of their priority dates without regard to state lines." Id., at 342. The Secretary manifestly cannot make any such allocation until he first knows the magnitude and priorities of the present perfected rights which must be protected, and hence how much remaining water there may be. Present perfected rights account for about twothirds of California's apportionment of 4,400,000 acrefeet of the first 7,500,000 acre-feet available for consumptive use in Arizona, California and Nevada.24 But to the extent the 424,145 acres referred to in the 1979 decree are denied a right to water, the Secretary will be unable to satisfy the decreed "present perfected rights" in the District, and the question of how much water he must reserve for California in that category becomes hopelessly muddled.

II. The Retroactive Decision of the Court of Appeals Conflicts with the Principles of Finality of Judicial and Administrative Determinations Which Have Been Laid Down by this Court.

Any conceivable uncertainty over excess land laws which might have existed after the Project Act became effective in 1929 was explicitly resolved by resort to all the methods which the English common law, federal statutory law, and United States constitutional law afford: express contract, regulation, administrative interpretation, and res judicata.

Actions by the Department

It had to be decided, and was decided, before the All-American Canal was built, whether the acreage

²⁴ See Arizona v. California, — U.S. —, 99 S. Ct. 995, 1000-1005 (1979).

limitations were applicable to Imperial Valley. It is clear beyond peradventure that the 1932 contract between the United States and the District was intended by the parties who negotiated it to determine that acreage limitations were not applicable to privately owned lands in the District. The Secretary of the Interior, who was named by Congress as the responsible official to contract for the United States, said so in a formal writing. His successors continued to say so in a variety of ways.

Secretary Wilbur had the task of "making the parts work efficiently and smoothly while they are yet untried and new." 25 He was the officer whom the Project Act vested with responsibility and authority to negotiate the contracts which §4(b), in conjunction with §5, made prerequisites to obtaining appropriations for the construction of Hoover Dam and the All-American Canal. He had to construe a new statute which contained directions that were not altogether consistent with one another, as this Court's opinion in Arizona v. California, supra, so clearly demonstrates. It was clear, however, as this Court later reaffirmed in Arizona v. California, that he was required by § 6 to so operate Hoover Dam as to satisfy present perfected rights, and § 13 made these rights run with the land. The history of negotiation of Article VIII of the Colo-

²⁵ Cf. Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933) where this Court said:

[&]quot;... administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful... The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Id., at 315.

rado River Compact, in which the term "present perfected rights" first appeared, and of the Project Act, make it clear that this language came into existence to protect the long-standing irrigation economy of Imperial Valley. As to acreage limitations, the only provision in the Act is § 9, which was specifically limited to public lands that would be newly opened to entry. And the legislative history of the Project Act showed at least six efforts to amend one or the other of the four successive Swing-Johnson bills to add a land limitation on private lands to the bill at a time when § 14 or its predecessor was in the bill. All of these efforts were ultimately unsuccessful.

Secretary Wilbur found clear directions that vested rights must be respected when water is delivered through federal works, even the rights of "excess" lands. Section 8 of the 1902 Act provided that nothing in that act "shall be construed as affecting . . . the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder . . . (emphasis added)." Accordingly, it had been the Department's practice, since at least 1905, to "flow through" water required to satisfy vested rights which preexisted the construction of a project. A 1910 regulation of the Department on this subject was on the books. 38 L.D. 637. It is still in force. It provides:

"The provision of section 5 of the act of June 17, 1902 (32 Stat. 389; 43 U.S.C. 381, 392, 431, 439), limiting the area for which the use of water may be sold, does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through the works con-

structed by the Government under appropriate regulations and charges." 43 C.F.R. § 230.70.

Accordingly, Secretary Wilbur, in the negotiation of the All American Canal contract, determined that the contract should contain only the limitation on public lands required by § 9 of the Project Act, and none on private lands.

He said:

"'Early in the negotiations connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this canal. Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right. These lands, having already a water right, are entitled to have such vested rights recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas.' "26 332 F. Supp., at 23. The entire ruling is reproduced in the Appendix at p. 213a.

He went on to cite Departmental precedents.

This ruling was submitted to the court in the then pending validation proceeding, *Hewes* v. *All Persons*.

Secretary Harold L. Ickes took office March 4, 1933, just before the hearing in the *Hewes* case. The contract,

The Court of Appeals points out that this letter refers to § 5 of the Reclamation Act of 1902, not § 46 of the Omnibus Adjustment Act of 1926. But this Court, in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 290 (1958), characterized the latter as a reenactment of the former.

because of the validation requirement, had not yet gone into effect. Far from intervening in Hewes to repudiate Secretary Wilbur's interpretation, Secretary Ickes (whom President Roosevelt appointed to serve also as Public Works Administrator), allocated P.W.A. funds for the construction of the All-American Canal as soon as the termination of the validation litigation permitted. He so reported to the President and the Congress. Annual Report of the Secretary of the Interior, F.Y. 1933. He continued for nine years to allocate P.W.A. funds or to submit justifications for appropriations to construct the All-American Canal until it was completed in 1942. For 34 years this interpretation was regarded as a rule of property by landowners in the purchase and sale of lands, by the Department of the Interior, and (on the Department's advice) by other federal agencies, including those which lent money in Imperial Valley.

In United States v. Midwest Oil Co., 236 U.S. 459 (1915), this Court said:

"It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself,—even when the validity of the practice is the subject of investigation." Id., at 472-473.

This criterion would seem to be fully satisfied by 34 years' adherence by six Secretaries, in four Presidential administrations, to the ruling made by the Secretary who had the responsibility for putting the Project Act into motion.

As the District Court pointed out:

"Congress for more than 30 years was fully aware of the 1933 ruling and interpretation of Secretary Wilbur and of the administrative practice predicated thereon. The Imperial Valley situation in light of such interpretation and practice was called to its attention in appropriation hearings for the construction and operation of the All-American Canal, at the hearings on the Central Valley and San Luis projects and at the hearings on the Small Projects Act of 1958." 322 F. Supp., at 27.

Congress repeatedly appropriated large amounts for the construction and operation of the All-American Canal, and took no action to reverse the known policy of the Interior Department with respect to Imperial Valley.

Judicial Determination: The Hewes Case

As required by § 1 of the Act of May 15, 1922, 42 Stat. 541, 43 U.S.C. § 511, the Imperial contract was submitted to a state court of competent jurisdiction for determination of the District's authority to execute it. Hewes v. All Persons. An objecting landowner, in his answer, put in issue the questions of (i) whether the reclamation law required that the contract contain a land limitation applicable to private owners, (ii) if so,

²⁷ Art. 31 of the contract incorporates the language of the 1922 statute.

whether this contract by its cross-reference to the reclamation law imposed such a limitation, (iii) whether the District had authority to enter into such an agreement, and (iv) related constitutional issues.

The state court, after trial, decided all of these issues in favor of the validity of the contract, and rejected the contention that the land limitations in the reclamation law were incorporated by reference in the contract and therefore were applicable to lands in the District.²⁸

It would appear to be beyond question that the state court's determinations must be accorded full faith and credit in the courts of the United States. 16 U.S.C. § 1738. The Court of Appeals, however, refused to do so. The court in its opinion acknowledged that the *in rem* validation proceeding was res judicata and foreclosed "further inquiry into the matters to which the judgment properly relates." 559 F.2d, at 525. However, it characterized the determination with respect to acreage limitations as "pure dicta." Id., at 526.

The court's premise that the contract would have been valid whether or not the reclamation law required the application of acreage limitations in the District is untenable. The parties to the contract were in agreement that the contract did not authorize acreage limitations on privately owned lands in the District. Secretary Wilbur had confirmed this. Thus, if the *Hewes* court had decided that the reclamation law required acreage limitations on private lands in the District, it necessarily would have held the contract invalid as

²⁸ See Appendix at p. 120a.

failing to conform to that law.²⁰ The Court of Appeals purports to take its view of the effect of validation proceedings from the California Supreme Court's opinion in *Ivanhoe Irrigation District* v. All Parties & Persons, 47 Cal. 2d 597, 306 P.2d 824 (1957), reversed sub nom., Ivanhoe Irrigation District v. Mc-Cracken, 357 U.S. 275 (1958), declaring that a validation proceeding "within its legitimate issues [is]... binding on the world at large." 559 F.2d, at 525. The Court of Appeals held, however, that there can be only one such issue, the contract's validity.³⁰

The Court of Appeal's error is in the implicit assumption that abstract "validity" can be usefully decided while divorced from any determination of what, if anything, the contract obligates its parties to do or not to do. An opinion by a California court declaring that "This contract is valid, and binding on all the world, but what the contract binds any party to do or to refrain from doing, and what if any remedy might be available, is beyond any issue reached," would be a useless absurdity.

The purpose of the 1922 statute requiring validation proceedings as a condition to the effectiveness of a federal contract under the reclamation law was to establish finality as against both parties to that contract—the United States and the irrigation district

²⁹ In *Ivanhoe*, which was relied on by the Court of Appeals, the parties to the contract were in agreement that the acreage limitation provisions of the reclamation law *were* applicable, and the contract explicitly so stated.

³⁰ In Ivanhoe vested water rights were not involved:

[&]quot;It is interesting to note that irrigators in this district receive water diverted from the San Joaquin in which they never had nor were able to obtain any water right." 357 U.S., at 285.

—before the former spent money to construct a project, and the latter became obligated to repay its cost.³¹ This necessarily included the adjudication of every issue raised in that validation proceeding against the enforceability of the obligations of either of them.³²

Every device known to the law was employed to make the agreement between the District and the United States effective and certain. If they failed—and clearly both they and the Department with whom they dealt did fail if the Court of Appeals' decision is allowed to stand—there is no mechanism known to the law by which such an agreement can be made certain. Contemporaneous construction, contract, long-continued reliance, and even the strongest legal cement available—res judicata—are all rendered ineffective retroactively, decades after the fact.

The importance of finality is not confined to the present case. It is not even confined to the many projects in Arizona, Nevada, and California served by water

and The United States has at times contended that a state court can have no jurisdiction to determine anything about rights in water to which the government claims ownership and control. That argument was conclusively disposed of in *United States* v. *District Court for Eagle County*, 401 U.S. 520 (1971). Congress can give a state court jurisdiction to decide whatever Congress by statute provides. 43 U.S.C. § 511 is meaningless if it does not dispose of any objection to a California court deciding, as expressly it did in *Hewes* v. *All Persons*, that the District's contract is valid and does not limit the acreage of privately owned farms.

³² In Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958), this Court, speaking of the finality to be accorded under the Federal Power Act to a court of appeals review of an order of the Federal Power Commission, said: "Such statutory finality need not be labeled res judicata, estoppel, collateral estoppel, waiver or the like either by Congress or the courts." Id., at 337.

stored in Hoover Dam under the Project Act.³³ It extends to all projects in the 17 Western States in which 43 U.S.C. § 511 was thought to have brought about a determination of the validity of contractual provisions before the project was built.

What might have been achieved under a limitation beginning in 1932 need not now be decided. It is clear that all who have acquired lands in Imperial Valley since the Project Act was authorized 50 years ago have paid prices determined by a market in which the value of the project to the land has been fully capitalized. Taxes and mortgage interest have been paid for several decades on values which include value added by the project. If a wrong has been committed, it is a wrong to today's generation which has paid excess prices, taxes, and interest. If there were speculators, they were speculators of the 1930s, not of the 1970s, who sold and took the windfall with them. Today's landowners paid full value. The United States suit to deny today's irrigators water served by the Project is like imprisoning the victim of a robbery rather than the robber.

III. The Decision Below Expands the Concept of "Standing" on an Unjustifiable Scale, to Include All Persons in the United States Who Might Profit From the Secretary's Power to Fix Prices of "Excess Lands" at Less Than Market Value on Forced Sale. If Such Authority Ever Existed as to Lands in the District, It Terminated on March 1, 1978

We contend that (i) the respondents never had standing, and (ii) if they ever had standing, it ended

³³ Palo Verde Irrigation District and the Metropolitan Water District are both contractees under the Project Act, and neither has ever been held subject to any excess land law.

with the termination of the Secretary's authority to fix prices on the sale of excess lands, which occurred in this case, March 1, 1978.

A. The Court of Appeals' opinion would expand the concept of standing on an unjustifiable scale

Respondents' only interest is that of citizens in general. They do not allege, and could not allege, any preference as against potential purchasers anywhere else in the United States. Inasmuch as respondents had no more direct interest in the case than, say, residents of Chicago who might, like them, see a chance for a windfall at the expense of the landowners, their status is somewhat less than that of private attorneys general seeking to second-guess the Solicitor General of the United States in his perception of the merits, after he had withdrawn the United States from the case.³⁴

The difference in the court's decisions in the residency and acreage cases is explainable only because the Secretary was believed to be empowered to fix sale prices in the acreage case, but not in the residency case. He lost this authority when the District completed payment of half of construction charges.

³⁴ In the companion "residency" case the Court of Appeals, in the same opinion that is addressed by this petition for certiorari, held that these same respondents lacked standing. It gave as its reasons:

[&]quot;Furthermore, any relief that could appropriately be ordered in this case would not redress plaintiffs' alleged injuries. The most that could be ordered is a discontinuance of deliveries of water to lands owned by nonresidents. Nonresident landowners could not be forced to sell their lands. Some lands owned by nonresidents might be turned to industrial or residential uses. . . . Land placed for sale by nonresidents could be purchased by residents other than the plaintiffs or by nonresidents who wished to move to the area in order to obtain farm land. These two groups of prospective purchasers would compete with plaintiffs for the purchase of available farm lands and drive up prices." 559 F.2d, at 519.

The Court of Appeals might well have quoted its own language in *Turner* v. *Kings River Conservation District*, 360 F.2d 184 (9th Cir. 1966):

"Moreover, the statutes [§ 46 of Omnibus Adjustment Act of 1926 and § 5 of Reclamation Act of 1902] imposed a duty upon the Secretary of Interior in the interest of the public at large, and there is nothing in the statutes to indicate that Congress intended to confer a litigable right upon private persons claiming injury from the Secretary's failure to discharge his duty to the public." Id., at 198.

B. More than one-half of the construction charges against all lands have been repaid

The standing of respondents—intervenors after the District Court's judgment went against the United States—was predicated wholly on the allegation that these particular people would benefit if the Secretary were enabled to fix prices at less than market value on the forced sale of excess lands. But the Secretary's authority to fix prices, if he ever had it with respect to lands in the District, expired on March 1, 1978. Section 46 fixes a termination date on the Secretary's price-fixing authority in these terms:

"[U]ntil one-half the construction charges against said lands shall have been fully paid no sale

³⁵ This a suit to enforce § 46 of the 1926 Act, not a suit to enforce § 5 of the Reelamation Act which also imposes a land limitation. The Court of Appeals was careful to make this distinction. 559 F.2d, at 537. The distinction was necessary because the court held that these same respondents lacked standing to sue to enforce the residency requirements of § 5. See 559 F.2d, at 517. It would have strained the imagination to discover that respondents had standing nevertheless to enforce the acreage limitation in that same section. But see *Ivanhoe Irrigation District* v. *McCracken*, which referred to the 1926 Act as a "reenactment" of Sec. 5 of the 1902 Act. 357 U.S. 275, 290 (1958).

of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior (emphasis added.)"

On March 1, 1978, the District completed repayment of more than one-half of the construction charges against all lands in the District. Counsel for the District informed the Court of Appeals, in the petition for rehearing, that this event was imminent.³⁶

The Secretary's authority to set prices for land having terminated when the District repaid 50 percent of the costs, the controversy became moot as to these respondents since the remedy which they sought was no longer available. The rule that the federal judiciary will not review moot cases is derived from the Article III requirement that the exercise of judicial power depends upon the existence of a case or controversy. Courts are guided by the familiar propositions that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them," North Carolina v. Rice, 404 U.S. 244, 246 (1971), and "when, pending an appeal from the judgment of a lower court . . . an event occurs which renders it impossible for this court . . . to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." American Book Company v. Kansas, 193 U.S. 49, 52 (1904), quoting Mills v. Green, 159 U.S. 651, 653 (1895). Cf. DeFunis v. Odegaard, 416 U.S. 312 (1974).

³⁶ The petition for rehearing en banc was filed September 8, 1977. The amounts involved are stated in the affidavit of Robert F. Carter, reproduced in the Appendix at p. 243a.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for writ of certiorari be granted.

Respectfully submitted,

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September 14, 1979

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Suprema Court, U. 3

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IN THE

MICHAEL BOBAK, JR., ELERN

Supreme Court of the United States

OCTOBER TERM, 1979

No. A-1105

IMPERIAL IRRIGATION DISTRICT, et al.,

Petitioners.

V.

BEN YELLEN, et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 14, 1979



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APPENDIX A

United States Court of Appeals, Ninth Circuit.

Aug. 18, 1977.

UNITED STATES of America, Plaintiff-Appellee,

v.

IMPERIAL IRRIGATION DISTRICT, a corporation, Defendant-Appellee,

John M. Bryant et al., Defendants-Appellees,

State of California, Defendant-Appellee, Ben Yellen et al., Appellants.

Ben YELLEN et al., Plaintiffs-Appellees,

V.

Cecil D. ANDRUS* et al., Defendants-Appellants.

Ben YELLEN et al., Plaintiffs-Appellees,

V

Cecil D. ANDRUS * et al., Defendants-Appellants,

W. L. Jacobs et al., Defendants-Appellants.

Nos. 71-2124, 73-1333, 73-1388.

^{*} Walter J. Hickel, as Secretary of the Interior, was the originally named defendant. We substitute the name of his present successor in office. F.R.App.P. 43(c).

* * * *

Appeals from the United States District Court for the Southern District of California.

Before BROWNING and KOELSCH, Circuit Judges, and WOLLENBERG,* * District Judge.

WOLLENBERG, District Judge:

The Imperial Valley in southern California is a highly productive agricultural area. This is due to an extensive irrigation system which distributes water obtained from the Colorado River, for without this irrigation water the Imperial Valley would be an unproductive desert. At issue in these cases is whether certain restrictions in the reclamation laws limit the delivery of irrigation water to resident landowners and whether water deliveries are limited to only 160 acres of the property held by each private landowner.

I. Historical Overview.

Because it is almost entirely below sea level, it was recognized as early as the middle of the nineteenth century that irrigation of the Imperial Valley with water diverted from the Colorado River was possible by gravity flow. A private corporation organized in 1896 as the California Development Corporation made the initial appropriations and diversions of Colorado River water. The water was taken from the River just north of the boundary between Mexico and the United States. However, in order to avoid high mesa and sandhill country north of the international boundary that separated the Colorado River from the Imperial Valley, the water was carried by canal for approxi-

^{* *} The Honorable Albert C. Wollenberg, Senior United States District Judge for the Northern District of California, sitting by designation.

mately 50 miles through Mexico. After the canal re-entered the United States, the water was distributed to land in the Imperial Valley through a system of irrigation canals owned by seven mutual water companies. These water companies had been organized by the California Development Company and were later acquired by the individual landowners whose land received the water.

In 1905, the Colorado River broke through its banks with disastrous results. The River changed its course and for many months flowed through the washed-out intake of the California Development Company into the canal in Mexico and then into the Imperial Valley. The flood created the Salton Sea with a surface area of over 330,000 acres within the Imperial Valley and threatened to destroy the entire area. The California Development Company could not contain the River. Danger to the tracks of the Southern Pacific led that company to advance funds to the California Development Company to control the River, and the railroad took a controlling interest in the Development Company as security. The railroad eventually succeeded itself in closing the breach in the river bank and returned the River to its channel. In 1916, the railroad foreclosed on the Development Company's interests and then transferred those interests to the Imperial Irrigation District (hereinafter "District").1

At first, the District distributed water to the seven mutual water companies on a wholesale basis. By 1923, however, the District acquired all of the mutual water companies. Since then, it has been the only entity diverting, transporting, and supplying water from the Colorado River to agricultural lands in the Imperial Valley.

The interstate allocation of water from the Colorado River, control of flooding, regulation of water supplies on

The District, an agency of the State of California, was formed in 1911. See Cal. Water Code §§ 20500 et seq.

a predictable and useful basis, and the construction of a canal to the Imperial Valley that did not pass through Mexico were major concerns of not only Imperial Valley landowners but of the seven states in the Colorado Basin during the early years of the 1900s. Extensive efforts to resolve these problems led first to the agreement in 1922 between Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming known as the Colorado River Compact and then to the passage in 1928 of the Boulder Canyon Project Act (hereinafter "Project Act"). 45 Stat. 1057, 43 U.S.C. §§ 617 et seq. The Project Act provided, inter alia, for ratification of the Colorado River Compact, the construction of Boulder (now, Hoover) Dam, and the construction of Imperial Dam where water was to be diverted to a canal running to the Imperial Valley. The canal was to run entirely through United States territory and hence received the name All-American Canal.

By the time the Project Act became effective in 1929, extensive private efforts had resulted in irrigation of almost 425,000 acres in the Imperial Valley. Since then, very little additional irrigated land has been added in the District. In 1932, the District entered into a contract with the United States providing for the construction of the Imperial Dam and the All-American Canal by the United States and repayment of certain costs by the District. Landowners in the Coachella Valley, north of the Imperial Valley, formed their own water district and eventually negotiated their own contract with the government for construction of facilities to deliver water to that Valley. Water delivery to the Imperial Valley through the All-American Canal began in 1940 and since 1942 the District's entire water supply has been carried through the All-American Canal. The District subsequently disposed of its interests in Mexico.

The 1932 contract with the District did not specifically provide for any acreage limitations on private lands receiving water through the massive projects being built by the United States. Due to the combination of a 1933 letter from the Secretary of the Interior to the District and the inaction of the Department of the Interior, no acreage limitations that were contained in the reclamation laws were enforced with respect to privately owned lands in the Imperial Valley. In 1964, the Solicitor of the Department of the Interior concluded that the previous Department interpretation of the law and administrative practice were incorrect and that the acreage limitations should apply to privately owned lands.

The Department of the Interior attempted to negotiate a new contract with the District that would incorporate acreage limitations but the negotiations failed. In 1967, therefore, the government filed an action for declaratory relief against the District. The complaint sought a declaratory judgment that the land limitation provisions of the reclamation law applied to privately owned lands in the District that received Colorado River water through the All-American Canal. The government specifically relied upon Section 46 of the Omnibus Adjustment Act of 1926, 44 Stats. 649, as amended, 43 U.S.C. § 423e (hereafter "Section 46"),² as the ăcreage limitation statute that applied.³

² In pertinent part, Section 46 provides that:

No water shall be delivered upon the completion of any new project or new division of a project initiated after May 25, 1926, until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States . . . and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. . . . Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one

In its suit, the government did not rely upon Section 5 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 431. That statute contains an earlier version of acreage limitations on lands receiving water through federal reclamation projects. It also restricts the delivery of water through federal reclamation projects to lands owned by residents of the reclamation project area. A group of Imperial Valley residents, dissatisfied with government non-enforcement of this statute in the Imperial Valley, brought suit in 1969 against the government to enforce the residency requirement of Section 5 of the Reclamation Act of 1902.

The government thus found itself in the position of claiming that, despite its previous inaction, one section of the reclamation law applied in the Imperial Valley while also defending its nonapplication of another section of the reclamation law which is in one respect similar to the stat-

hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior. Because of California's community property laws, a husband and wife may own 320 acres and still be in compliance with the reclamation law. For the sake of consistency with the statutory language, the limitation referred to throughout this opinion will be 160 acres.

³ For a more detailed historical account, see *United States* v. *Imperial Irrigation District*. 322 F.Supp. 11, 12-15 (S.D.Cal.1971). Additional historical data will be referred to in the course of this opinion.

⁴ The precise scope of this restriction was hotly contested in the proceedings below.

ute it sought to apply. The cases were heard by two different judges and eventually the government's position was rejected in both cases. Before reaching the substantive matters raised in the appeals from these two decisions, we are obliged to consider procedural complications and questions of standing.

II. Standing.

A. Yellen v. Andrus, Nos. 73-1333, 73-1388.

This action (hereinafter "the residency case") was instituted by several individuals who resided within the boundaries of the Imperial Irrigation District but who owned no farm land in the District or anywhere else in the United States. They sought to compel the Secretary of the Interior and various officials of the Department of the Interior to enforce the residency requirements of Section 5 of the Reclamation Act of 1902, 43 U.S.C. § 431. Their case was brought in the form of a mandamus action under 28 U.S.C. § 1361.

In 1971, the district court granted partial summary judgment against the government, holding that 43 U.S.C. § 431 applies to private lands within the Imperial Irrigation District receiving water from the Boulder Canyon

In referring to the sale of rights to the use of water delivered through federal reclamation projects to private landowners, 43 U.S.C. § 431 provides, in pertinent part, that "no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land." Act of June 17, 1902, c. 1093 § 5, 32 Stat. 389. Section 5 also contains limitations on the size of tracts for which rights to the use of water may be sold and conditions the permanent attachment of such rights on full payment by the landowner. The complaint did not seek enforcement of these portions of Section 5.

Project through the All-American Canal. Yellen v. Hickel, 335 F.Supp. 200 (S.D.Cal.1971). Thereafter, various landowners in the Imperial Valley intervened and raised arguments not previously set forth by the government. A full trial on the merits was then held. The district court issued findings of fact and conclusions of law and again held for the plaintiffs. Yellen v. Hickel, 352 F.Supp. 1300 (S.D.Cal.1972). Judgment in favor of the plaintiffs was entered and both the government and the intervening landowners appealed.⁶

The issue of plaintiffs' standing to bring this action was considered at various times in the district court proceedings and was resolved in favor of the plaintiffs. See 352 F.Supp. at 1303-1304. In light of more recent Supreme Court decisions, this Court has not adopted the test for standing used by the district court in this case. Bowker v. Morton, 541 F.2d 1347, 1349 n.3 (9th Cir. 1976). At this Court's invitation, the parties have submitted additional briefs on the standing question in light of the Bowker decision.

In Bowker v. Morton, a group of small family farmers in one area of California sought to compel the government to apply the federal reclamation laws, particularly the residency requirement of 43 U.S.C. § 431 and the statutes concerning excess land holdings, to an irrigation project in another area of California. Although injunctive relief against other landowners was sought, the most the Bow-

⁶ The government's appeal is No. 73-1333, and the appeal of intervening landowners is No. 73-1388.

⁷ While the standing issue was raised below, at one time during the course of this appeal it may not have been pressed by the appellants. However, "since jurisdiction to decide the case is implicated," the issue must be considered. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

ker plaintiffs could have obtained was an order requiring the government to enforce the reclamation laws and discontinue supplying water to lands not in compliance with the law. That is essentially the relief sought by the plaintiffs in this case, and the standing test enunciated in Bowker applies in this case as well. Distilled from the recent cases of Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976), and Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), that test, "compactly put, ... is that the plaintiffs must have alleged (a) a particularized injury (b) concretely and demonstrably resulting from defendants' action (c) which injury will be redressed by the remedy sought." 541 F.2d at 1349. Application of that test to the facts of this case leads to the conclusion that the plaintiffs have no standing to maintain this action.

In their amended complaint, the plaintiffs alleged that they resided within the boundaries of the Imperial Irrigation District and in the vicinity of privately owned lands which are irrigated by water supplied through the federal reclamation project. They alleged that the only source of irrigation water in the Imperial Valley is the federal project. Much of the irrigated farm land in the area was alleged to be owned by persons who were not bona fide residents on the land and who were not residing in the neighborhood of the land. None of the plaintiffs owned any farm land and they alleged a desire to own farm land in the area. Because of the scant rainfall and lack of any other irrigation source, the plaintiffs would have to purchase lands irrigated with water from the federal reclamation project in order to fulfill their desire to own farm land. The essence of their case is that their ownership desires have been

⁸ The record on this appeal does not include a copy of the amended complaint. However, the amended complaint does appear in the record of the companion appeal, No. 71-2124, in the Clerk's Transcript, Volume I, at pages 206-211.

blocked because the government, by failing to enforce the residency provision of 43 U.S.C. § 431, permits irrigation water to be received by nonresident owners of farm land and that enforcement of the law will result in making farm land available for purchase at prices plaintiffs could afford. The district judge found that about half of the farms in the Imperial Irrigation District were owned by nonresidents and that enforcement of the residency requirement would bring "an immediate and substantial decline in the market value of farm land" in the District. He made no findings concerning the proportion of the farm acreage in the District owned by nonresidents or what his term "substantial decline" meant in terms of actual prices for farm acreage.9

In Bowker, the plaintiffs had not alleged that they desired to buy land in the area which they sought to bring under the provisions of the federal reclamation laws, and they did not state any prices which they could afford to pay should land be available for purchase. Consequently, their claim that failure to enforce the federal reclamation laws resulted in the unavailability of land for purchase at "reasonable" prices was held to fail to set out "a particularized injury resulting from the defendants' action." 541 F.2d at 1350. Here, plaintiffs do allege a desire to purchase farm land. However, there is nothing in the record to indicate what price any plaintiff could afford to pay for any particular farm or that enforcement of the residency requirement of 43 U.S.C. § 431 will lead to a decline in farm land prices sufficient to bring those prices into a range where plaintiffs could afford to purchase a particular farm.10

⁹ Findings of Fact XXIX, XXX. 352 F.Supp. at 1317.

¹⁰ Plaintiffs cannot assert injury in their status as taxpayers. Bowker v. Morton, supra, 541 F.2d at 1349 n.2. In addition, they cannot claim injury from any failure of the government to discharge its duty to the public. Turner v. Kings River Conservation District, 360 F.2d 184, 198 (9th Cir. 1966).

The relief sought by the plaintiffs in this case would not come through the government action they seek. The price of land is determined by the relationship between the demand for and supply of land in the Imperial Valley. The land market would adjust to a new residency requirement but at levels that cannot be determined with any degree of precision and which may still be higher than plaintiffs can afford. It is indisputable that a wide variety of other government actions can also affect this land market. A change in tax regulations relating to agricultural land or a change in the crop support system for crops grown in the Imperial Valley could just as likely affect the price of agricultural land as an application of the residency requirement. In addition, plaintiffs' inability to afford farming land also stems from their insufficient income. A change in government regulations concerning loans for the purchase of agricultural lands or income support to agricultural workers could increase the plaintiffs' ability to purchase farming land without necessarily reducing the price of land. The injury plaintiffs allege-the inability to purchase farming land at prices they can afford—is neither particularized nor does it flow "concretely and demonstrably" from the government's activities, or lack of activity, challenged in the complaint.

Furthermore, any relief that could appropriately be ordered in this case would not redress plaintiffs' alleged injuries. The most that could be ordered is a discontinuance of deliveries of water to lands owned by nonresidents. Nonresident landowners could not be forced to sell their lands. Some lands owned by nonresidents might be turned to industrial or residential uses. Nonresidents could move back to the area and continue to receive irrigation water for their lands. Land placed for sale by nonresidents could

¹¹ The government has contended that residency is not a continuing requirement for the delivery of water. See, e. g., 43 C.F.R. § 230.65. In that case, those nonresidents who were residents when they first began to receive water might be able to continue

be purchased by residents other than the plaintiffs or by nonresidents who wished to move to the area in order to obtain farm land. These two groups of prospective purchasers would compete with plaintiffs for the purchase of available farm lands and drive up prices. Plaintiffs were not required to prove with absolute certainty that this aspect of the test for standing would be satisfied, but after a full trial we are still of the opinion that:

[i]t is a mere speculative possibility that any relief which is appropriate under the statute will bring about the result sought by plaintiffs. . . . [T]he solution to plaintiffs' problem depends upon decisions and actions by third parties who are not before the court and who could not properly be the subject of a decree directing the result sought by plaintiffs.

Bowker v. Morton, supra, 541 F.2d at 1350.12

to receive that water even if the residency requirement of Section 5 was enforced. This would add a further factor of uncertainty when considering whether plaintiffs' injuries would be redressed by the order they seek. However, the district court rejected this interpretation of Section 5. Consequently, without expressing any opinion on the correct view of the problem, we do not consider the possibility that residents could continue to receive water for their lands even after they move out of the area when evaluating the standing problem.

12 This is not a case where remand to the district court for the purpose of making further relevant findings of fact would be appropriate. No individual plaintiff testified at the trial, and there is no other evidence which would support any findings on the desires of any individual plaintiff to purchase any particular farm. In addition, the testimony of the agricultural economist that forms the basis for the district court's finding that enforcement of the residency requirement would bring an "immediate and substantial" decline in land prices cannot support any findings more definite than the one the district court has already made. In fact, that testimony sets forth so many variables that must be considered in conjunction with a theoretical enforcement of the residency requirement that it supports, rather than detracts from, the conclusion that plaintiffs' injuries would not be redressed by the relief requested in this lawsuit. See Reporter's Transcript, pps. 254-277.

The conclusion that plaintiffs lack standing is not changed, as plaintiffs would suggest, by the decision of Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). The individual plaintiff in that case alleged more than a desire to live in a certain municipality. Instead, he sought to live in a particular proposed housing development, and he would have qualified to live there had the development been built. The builder of the proposed project was a co-plaintiff, and the challenged action of the municipal government was a direct road-block to the fulfillment of the desires of both plaintiffs. There was no generalized grievance where redress depended on speculation about the activities of third persons not parties in the lawsuit. 429 U.S. at 260-264, 97 S.Ct. 555. The plaintiffs herein, on the other hand, are like the individual plaintiffs who were found to lack standing in Warth v. Seldin, supra, 422 U.S. at 502-508, 95 S.Ct. 2197.13

B. United States v. Imperial Irrigation District, No. 71-2124.

This appeal (hereinafter the "acreage case") comes to us in a different procedural posture from the residency case. Here, the complaint was filed by the government. It

¹³ There is a second, nonconstitutional standing requirement that the interests of the plaintiffs be "arguably within the zone of interests to be protected or regulated" by the statute which plaintiffs seek to enforce. Data Processing Serv. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1969), cited in Simon v. Eastern Kentucky Welfare Rights Organization, supra, 426 U.S. at 39 n.19, 96 S.Ct. 1917, 48 L.Ed.2d 450. Determination of this question would also be relevant to the determination of whether the government has a "duty" to plaintiffs which can be enforced by an action in the nature of mandamus under 28 U.S.C. § 1361. In view of our disposition of this case, there is no need to consider these questions as they arise in the context of this case.

sought a declaration that the excess land provisions of the reclamation laws, particularly Section 46 of the Omnibus Adjustment Act of 1926, applied to privately owned lands in the Imperial Irrigation District that received irrigation water through the All-American Canal. There was no question of the government's standing. This case was not heard by the same judge who made the decisions in the residency case. In an opinion reported at 322 F.Supp. 11 (S.D.Cal.1971), the district court ruled against the government. Judgment was entered, and the government decided not to appeal.

After judgment had been entered and before the time for filing a notice of appeal had run out, a group substantially identical to the plaintiffs in the residency case filed a protective notice of appeal and sought leave to intervene. The district court denied permission to intervene. On appeal, another panel of this Court reversed the district court's order denying permission to intervene, allowed intervention, and validated the protective notice of appeal. That panel further ordered that the appeal in this case be consolidated with the appeals in the residency case.

The unpublished order allowing intervention is attached as an appendix to this opinion. The order emphasized the two conflicting decisions from the district court concerning applicability of the reclamation laws and the responsibility of the court to resolve this problem if such a resolution were "feasible". Of course, that the panel did not have the residency appeal before it and could not anticipate our decision on standing in light of cases, such as Bowker v. Morton, supra, which had not been decided when intervention was allowed. Since the district court decision in the residency case must be vacated because of lack of standing on the part of the plaintiffs therein, the basis for the order

¹⁴ This group had previously been given permission to appear below as *amicus curiae*.

allowing intervention in the acreage case has disappeared.¹⁵

The Yellen intervenors urge that the order allowing intervention cannot be re-examined because of the "law of the case" doctrine. That doctrine, however, is not to be applied woodenly. An appellate court has the power to reconsider issues that have been previously decided and will do so if such a course is warranted by "considerations of substantial justice." Lehrman v. Gulf Oil Corporation, 500 F.2d 659, 662-663 (5th Cir. 1974), cert. denied, 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed.2d 400 (1975). This case does not involve a previous remand to the district court or "panel shopping" by any of the parties. It involves an unpublished interlocutory order allowing an appeal to go forward where the basis of the order has been eliminated by subsequent events. It would be ironic to allow the

¹⁵ The order allowing intervention also appears to be based on a misunderstanding as to the identity of the various intervenors. The district court allowed various interested Imperial Valley landowners to intervene as defendants early in the proceedings. This Court's earlier order allowing intervention refers to the "interested Imperial Valley landowners" as the group seeking to perfect and prosecute the appeal. In fact, this group had obtained a favorable decision from the district court and opposed the prosecution of an appeal by parties other than the government. It was the Yellen group, a group of non-landowners, who had filed the protective notice of appeal and who sought to prosecute the appeal, and whose intervention request had been denied by the district court.

¹⁶ Under Ninth Circuit Rule 21, the unpublished order allowing intervention is not regarded as precedent but is relevant to the law of the case. Whether it should stand as the law of the case is the very question we determine. The order itself required the appeal to be heard by this panel in conjunction with the appeal in the residency case and thus necessarily contemplated that this panel would dispose of both cases in the appropriate manner. Such a disposition includes a determination of the proper law of the case. Under these circumstances, there is no requirement that reconsideration of the order allowing intervention be done en banc. Cf. Chabot v. National Securities and Research Corporation, 290 F.2d 657, 659 (2d Cir. 1961).

Yellen intervenors to use an erroneous district court ruling on standing in another case to bootstrap themselves into a position of litigating the important question of the enforcement of the federal reclamation laws in this case. Under these circumstances, it is appropriate to once again examine the request for intervention.

A party seeking to intervene pursuant to Rule 24, Federal Rules of Civil Procedure, need not possess the standing necessary to initiate the lawsuit. Troovich v. United Mine Workers of America, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972). Nevertheless, a party possessing the standing to intervene does not automatically have the ability to appeal a decision which all other parties have decided not to appeal. In order to be able to appeal, the intervenor must have an "appealable interest." Shapiro, Some Thoughts on Intervention Before Courts, Agencies and Arbitrators, 81 Harvard Law Rev. 721, 753-754 (1968). Resolution of this question turns on traditional standing analysis. Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011, 1013-1014 (3rd Cir. 1971). Mere interest in the establishment of a legal precedent is not sufficient. Boston Tow Boat Co. v. United States, 321 U.S. 632, 64 S.Ct. 776, 88 L.Ed. 975 (1944). With these considerations in mind, we turn to the question of whether the Yellen group had an interest in this litigation that would permit them to intervene for the purpose of taking an appeal from the judgment of the district court.

In support of their motion for permission to intervene, the Yellen group asserted that they resided within the boundaries of the Imperial Irrigation District, that most of them were farm workers, that none owned farm land anywhere in the United States, and that they desired to purchase "excess lands" irrigated with water delivered by the federal reclamation project. These excess lands would be the private lands that would have been sold under the provisions of Section 46 of the Omnibus Adjustment Act

of 1926, 43 U.S.C. § 423e, had the government prevailed in the litigation. They further alleged that they were within the class of beneficiaries of the reclamation laws that were the focus of the lawsuit.¹⁷ Read, as it must be, in the light of the government's complaint, their interest is in the purchase of farm lands at prices to be set in accord with the dictates of Section 46.

This Court has only recently extensively reviewed the purposes behind Section 46. That Section was adopted to achieve broad antimonopoly and antispeculation purposes "conceived by Congress to be of importance to society as a whole." United States v. Tulare Lake Canal Co., 535 F.2d 1093, 1121 (9th Cir. 1976), cert. denied, 429 U.S. 1121, 97 S.Ct. 1156, 51 L.Ed.2d 571. We specifically noted also that "Section 46 was intended to accomplish the redistribution of large privately owned tracts at prices substantially below the actual value of such lands at the time of sale." Id. The history of the reclamation laws confirms that one of their primary purposes was the establishment of a large number of family-size farms. Id. at 1119, 1122. See generally, Taylor, The Excess Land Law: Execution of a Public Policy, 64 Yale L.J. 477, 481-489 (1961). In this case, the district court found that there were approximately 800 owners of irrigable land in the Imperial Irrigation District whose holdings totalled over 160 acres and that the aggregate land-holdings of this group were approximately 233,000 acres.18 Sale of any of these holdings in excess of 160 acres in accord with Section 46 would

¹⁷ They also alleged an interest because of their prosecution of the residency case. In light of our disposition in that action, we do not consider whether this is an interest that would support intervention.

¹⁸ United States v. Imperial Irrigation District, supra, 322 F.Supp. at 12.

make family-size farms available for purchase in the Imperial Valley at prices below current market prices.¹⁹

The injury that the Yellen group is asserting in this case is not merely the high cost of land. More precisely, they assert that in order to buy irrigable farm land in the Imperial Valley they must pay prices higher than they would have to pay if Section 46 applied to the private landowners in the area. The Yellen group suffers from this injury no matter which parcel of land is desired for purchase. The fact that it cannot be specifically measured in dollar amounts at this time does not change the fact that, under the formula established in *United States* v. *Tulare Lake Canal Co.*, supra, the sale price of parcels of irrigable farm land in the Imperial Valley will definitely be reduced if Section 46 were to be applied as the United States orginally contended when this action was filed.

This injury stems directly from the lack of recordable contracts required by Section 46. In the absence of a requirement that landowners execute such a contract in order to receive irrigation water, it is inconceivable that any landowner would sell any land at prices substantially below current market prices.

Furthermore, this injury would be redressed by a court order declaring the applicability of Section 46. There would be no need to bring additional parties before the district court before such an order could be issued. Once there was such a court order, redress of the injury would not depend upon the uncertain responses of the large landowners or the land market. While not all landholders might execute the contracts required by Section 46, the vast majority of the land in use in the Imperial Valley Irrigation District is engaged in agricultural production and it would be highly

¹⁹ For a description of the method for determining the sale price, see *United States* v. *Tulare Lake Canal Co.*, supra, 535 F.2d at 1113 n.74, 1144.

improbable that all of the large holdings of irrigable land would be withdrawn from agricultural use in order to avoid the requirements of Section 46. Once the appraisal process was completed, formerly large agricultural land-holdings would be available in small parcels at prices below the current market price.

It is important to emphasize the difference between the interest and injury involved in this case and the situations in the residency case and the Bowker case where the plaintiffs were found to lack standing. In the residency case, the plaintiffs sought a court order that would not, except in a very speculative sense, lead to the availability of farm land at an undefinable price which the plaintiffs could allegedly afford. In contrast, the interest asserted here is much more limited. It is an interest only in reducing land prices, not an interest in reducing land prices to any specific level, and unlike the residency case it is an interest that can be satisfied by an appropriate court order and without the need to depend on the uncertain actions of non-parties to the action and the uncertain responses of the market for agricultural land. In the Bowker case, the plaintiffs sought only to force landowners in another area to sell their land at prices determined by the application of Section 46. They did not desire to purchase this land. even if the price were to be reduced, and those plaintiffs were therefore not injured by higher land prices. In contrast, the group attempting to intervene and prosecute the appeal herein desires to take advantage of a certain reduction in land prices and purchase land at those reduced prices.

In its order denying the Yellen group leave to intervene, the district court noted that the potential intervenors had not demonstrated a present ability to purchase the lands they desired. The district court also noted that the requirement for recordable contracts was not inconsistent with the usual right of a seller to choose his purchaser and that

there would quite likely be a large group of people with veteran's preferences for the purchase of excess lands that would have a better chance than the Yellen group to purchase excess lands created by the enforcement of Section 46.20 However, the standing test of Article III does not require that the Yellen group show with certainty that they will be able to purchase the excess lands should they prevail on the merits of this appeal. The Yellen group occupies a position similar to that of the developer in Village of Arlington Heights v. Metropolitan Housing Development Corporation, supra. The relief sought by the developer would not guarantee that its project would be built, for further problems with financing or construction, unrelated to the subject of the lawsuit, might interfere with its building plans. Such speculation, however, could not diminish from the fact that the relief sought was necessary if construction were to take place and that the developer had the requisite stake in the lawsuit. 45 U.S.L.W. at 4076. Similarly, in this case the likelihood that other factors may interfere with the intervenors' desires to purchase land cannot change the fact that land will never be available at below current market prices unless Section 46 is held to be applicable and that the intervenors thus have the necessary stake in the outcome of the lawsuit to confer standing to prosecute this appeal.21

²⁰ We express no opinion on the validity of these propositions.

²¹ See also National Association of Neighborhood Health Centers, Inc. v. Mathews, 179 U.S. App.D.C. 135, 551 F.2d 321 (D.C.Cir.1976). There, an organization of community mental health centers sought to appeal a district court order concerning the transfer of federal funds by certain states from outpatient aid programs to hospital aid programs. Return of the funds to the outpatient aid program would not have meant that the plaintiff organization's members in those states would then have received the funding grants under the outpatient aid program. However, return of the funds would have benefited these members because it would create a larger pool of funds available for

Finally, it must be determined whether the Yellen group has an interest sufficiently within the "zone of interests" protected by Section 46 which is different from the interest of a taxpayer or member of the general public and which satisfies the non-constitutional test for standing of Data Processing Serv. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1969).²² From our previous summary of the purposes behind Section 46, derived from United States v. Tulare Lake Canal Co., supra, it would appear that a non-landowning resident of an area where agriculture is feasible only because of a federal irrigation project who desires to purchase agricultural land and become a farmer is a particular "beneficiary" of Section 46 distinct from the general public and falls within the statute's "zone of interests."

The Yellen group thus has an interest under Rule 24(a)(2) which it may pursue on appeal.²³ Accordingly, we reaffirm

outpatient programs. This enhancement of the prospect of funding was held to be "substantial relief" sufficient to establish standing to challenge the district court's order concerning the transfer of funds. *Id.* at 329. Similarly, in this case, the intervenors' opportunity to obtain significantly lower land prices would be substantially enhanced by an appropriate court order. In the residency case, however, our previous discussion has pointed out that there is no substantial certainty that the opportunity of the plaintiffs therein for obtaining the relief sought in that case would be enhanced by an appropriate court order.

²² See footnotes 9 and 12, supra.

²³ The district court discussed other reasons for denying intervention. First, it held that a previous proceeding in the California courts precluded the applicants for intervention from further litigating the acreage limitation question. We consider this problem in Section III, *infra*. The district court also decided that the Yellen group's interest was toe speculative and remote to support intervention because its decision on the merits would first have to be reversed on appeal. However, that was the very result that the Yellen group sought. The district court also felt that the necessity for further proceedings to determine the value of lands

the previous order granting intervention and validating the protective notice of appeal, and we proceed to consider the merits of the case.

III. Res Judicata.

After the United States and the Imperial Irrigation District entered into the contract for the regiment of construction costs for the All-American Canal, the District initiated a confirmation action in the Superior Court of California for Imperial County. This action, entitled Hewes v. All Persons, resulted in a 1933 judgment that the landowners²⁴ claim is res judicata as to the contention that acreage limitations apply to privately owned lands in the Imperial Irrigation District.

In 1933, California law allowed an irrigation district to submit a contract for cooperation with the United States to a superior court for a validation proceeding.²⁵ Pursuant

to be disposed and a plan for disposition made the possibility of relief even more remote. The length of time, however, before lands become available does not diminish the interest of the applicants for intervention. Finally, the district court noted that the United States had vigorously represented the interests of the Yellen group throughout the litigation. However, the decision of the government not to appeal meant that those interests were no longer being adequately represented.

²⁴ Appellees in this case are the Imperial Irrigation District, named as a defendant below, landowners in the District owning more than 160 acres of irrigable land (appearing on behalf of themselves and the class of landowners owning excess lands) who were allowed to intervene by the district court, and the State of California which was also allowed to intervene below. Not all of the appellees have raised the same arguments in support of the judgment but none have taken positions that contradict the arguments of another appellee. The briefs of the landowner intervenors are the most comprehensive. Consequently, for the sake of convenience, all the appellees will be referred to throughout the remainder of this opinion as landowners.

²⁵ 1897 Cal.Stat. c. 189, p. 276 § 68; 1917 Cal.Stat. c. 160, p.
 243 § 3. See Cal.Water Code §§ 22670-22671, 23225.

to Article 31 of its contract with the United States, the District was required to institute a judicial confirmation proceeding, and the Hewes action was designed to satisfy that requirement.26 The validity of the contract was challenged on grounds not relevant here by landowners in the Coachella Valley. At the same time, a landowner in the Imperial Valley named Charles Malan instituted another action entitled Malan v. Imperial Irrigation District. The Malan action raised a number of objections to the contract. One of those objections was that Malan, as an owner of more than 160 acres, would be deprived of delivery of water for his excess lands by the reclamation law if the contract was confirmed. The District took the position that this objection was meritless as the acreage limitation provisions did not apply under the terms of the Project Act. The District even went so far as to solicit a letter from the Secretary of the Interior to support their position in the Malan litigation.27

The Malan case was considered along with the Hewes confirmation proceeding. The superior court found that the contract would not limit the delivery of water to excess lands, concluded that no acreage limitations were made applicable to private lands by the contract and specifically stated that Section 5 of the Reclamation Act of 1902 did not apply in the Imperial Valley.²⁸ The judgment of the

²⁶ No such requirement was contained in the Project Act. The parties dispute whether the requirement was placed in the contract because of provisions for a confirmation proceeding in Section 46, Section 1 of the Act of May 15, 1922, 43 U.S.C. § 511, or merely because of California law. We deem it unnecessary to decide the source of authority for the contract provision for a judicial confirmation proceeding. The relevant issue is the res judicata effect to be given a judgment actually rendered by a California court in a confirmation proceeding.

²⁷ See part VI of this opinion.

²⁸ Although partially denominated a finding of fact, it is clear that all of the essentials of the decision on the acreage limitation issue were legal conclusions.

superior court became final in 1934 when appeals from that judgment to the California Supreme Court were dismissed by the parties.²⁹

The United States was not a party in the Hewes and Malan actions, and the landowners did not raise a res judicata defense against the United States in the district court proceedings in the present case. The intervenors claim that such a defense cannot be raised against the United States and therefore cannot be raised against them because they are only asserting claims originally raised by the government. However, as discussed previously, the interests of an intervenor appealing a judgment are not necessarily identical with the interests of a non-appealing party which originally instituted the action. The intervenors' interests in this case are their own private interests and not the public interests represented by the government. Accordingly, we must determine whether the intervenors are barred by res judicata from litigating the acreage limitation question.

Under California law, a confirmation proceeding involving an irrigation district contract with the United States is considered an *in rem* proceeding. It is brought against all persons claiming an interest in the formation of the irrigation district, the operation of the contract, and the lands affected by the contract. A final judgment in a con-

²⁹ While the appeal was pending, the Bureau of Reclamation sent a letter to the Coachella Valley water district to the effect that unless it dismissed its appeal, the Bureau would make plans for the All-American Canal that would not include a capacity to deliver water to the Coachella Valley. While the reasons for the dismissal of the Coachella appeal are not in the record, it should be noted that shortly thereafter the Coachella appeal was in fact dismissed and a separate contract for the Coachella Valley was negotiated with the United States. The record also includes a letter from Malan's attorney complaining about pressure to drop the appeal, but the record does not contain anything to explain why Malan's appeal was dismissed.

firmation proceeding "will foreclose further inquiry into the matters to which the judgment properly relates. Within its pertinent issues it will be binding on the world at large." Ivanhoe Irrigation District v. All Parties & Persons, 47 Cal.2d 597, 606, 306 P.2d 824, 829 (1957), reversed on other grounds sub nom., Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958). Phrased another way, "[w]ithin its legitimate issues it will be binding on the world at large." Santa Barbara County Water Agency v. All Persons & Parties, 47 Cal.2d 699, 703, 306 P.3d 875, 878 (1957), reversed on other grounds sub nom., Ivanhoe Irrigation District v. McCracken, supra.

It therefore becomes necessary to determine what the "pertinent" or "legitimate" issues are in a confirmation proceeding, because the California courts will recognize the confirmation proceeding judgment as res judicata only as to those issues to which the judgment "properly relates". This question was answered in the Ivanhoe proceedings in opinions of the California Supreme Court both before and after the Supreme Court decision on other aspects of the case. "The judgment [in a confirmation proceeding] is limited to a determination of the validity of the contract." Ivanhoe Irrigation District v. All Parties and Persons, supra, 47 Cal.2d at 607, 306 P.2d at 829, such a judgment determines questions necessarily incident to such a determination. Id. However, "the only issue involved is the validity of the contract." Ivanhoe Irrigation District v. All Parties and Persons, 53 Cal.2d 692, 699, 3 Cal.Rptr. 317, 320, 350 P.2d 69, 72 (1960) (Emphasis supplied.)

For purposes of this case, therefore, we start with the proposition that the *Hewes* judgment establishes the validity of the contract. That portion of the *Hewes* decision dealing with the acreage limitations of the reclamation law, however, is not essential to a determination that the contract was valid. A decision that the Project Act incorporates the acreage limitations on private lands of the

reclamation law into the contract would not make the contract invalid under federal law, Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958), or California law. Ivanhoe Irrigation District v. All Parties and Persons, 53 Cal.2d 692, 3 Cal.Rptr. 317, 350 P.2d 69 (1960). A decision that the Project Act does not incorporate the acreage limitations is a decision that Congress exempted the project from application of those limitations and would not make the contract invalid under federal or California law. The decision that acreage limitations did not apply under the contract was therefore irrelevant to the only question properly before the court in the confirmation proceeding—the validity of the contract—and it is pure dicta. Cf. Stanson v. Mott, 17 Cal.3d 206, 212, 130 Cal.Rptr. 697, 701, 551 P.2d 1 (1976).

The federal courts are bound to give the Hewes judgment the "same full faith and credit" it would be given by the courts of California. Neale v. Goldberg, 525 F.2d 332 (9th Cir. 1975). The determination of the Hewes court that acreage limitations did not apply in the Imperial Irrigation District was not a determination which is "properly related" to the purpose of the confirmation proceeding because decision of that issue one way or another cannot affect the validity of the contract under federal or California law. The determination of the acreage limitation issue by the Hewes court was an interpretation of the terms of the contract that the court was not entitled to make in a confirmation proceeding. Cf. Ivanhoe Irrigation District v. All Parties and Persons, supra, 53 Cal.2d at 727-728, 3 Cal.Rptr. at 338, 350 P.2d at 90. While the acreage limitation was litigated in the confirmation proceeding, that issue was inci-

³⁰ While this case interpreted Cal. Water Code §§ 23197, 23200, which were enacted in 1943, those statutes are essentially the same as earlier California statutes to the same effect that were applicable when the Imperial Irrigation District contract was made. See 1917 Cal.Stat. c. 160, pps. 244, 245, §§ 2, 4.

dental and collateral to the judgment rendered therein. The judgment in the confirmation proceeding cannot foreclose consideration of the acreage limitation issue in the present case. *Memorex Corp.* v. *International Business Machines Corp.*, 555 F.2d 1379, 1898 (9th Cir. 1977).³¹

IV. Statutory Construction.

The enactment of the Boulder Canyon Project Act was not due solely to the problems of the Imperial Valley. A canal to the Valley running entirely within the United States had been desired for many years, and the District, unable to construct the necessary facilities with its own resources, had turned to Congress for assistance. In addition, however, the Project Act was the outgrowth of extensive concerns of the seven Colorado River Basin states over allocation of river water on an equitable basis, the control of flooding, and the more productive use of the water. Moreover, international considerations were involved because of Mexico's interest in the Colorado River. The history of the Project Act summarized in Arizona v. California, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963), need not be repeated here. See also Arizona Power Authority v. Morton, 549 F.2d 1231, 1233-1234 (9th Cir. 1977). For present purposes, it is sufficient to say that Congress recognized that the problems could not be handled on a local or even state-by-state basis, and that the matter had become a pressing national concern.

³¹ We therefore need not determine whether intervenors were interested parties in the *Hewes* litigation such that they were bound by the determination of the acreage limitation issue when neither of the parties litigating that issue wished to see the acreage limitations apply in the Imperial Valley, *Aerojet-General Corporation* v. *Askew*, 511 F.2d 710, 720-721 (5th Cir. 1975), *reh. den.*, 514 F.2d 1072 (1975), or whether important policy considerations mandate the inapplicability of *res judicata* principles in litigation of the acreage limitation question.

At the same time as the concerns and proposals culminating in the passage of the Project Act had been occupying the attention of Congress, various revisions of the general reclamation laws, culminating in Section 46 of the Omnibus Adjustment Act of 1926, had been enacted into law. Section 12 of the Project Act defined the term "reclamation law" to include the Reclamation Act of 1902 "and the Acts amendatory thereof and supplemental thereto," 43 U.S.C. § 617k, and Section 46 would be included in that definition. Section 14 of the Project Act stated that the Act was a "supplement" to the reclamation law. 43 U.S.C. § 617m. By the operation of Sections 12 and 14, the Project Act was incorporated into the framework of the reclamation laws, including Section 46, that had recently been considered by Congress and that had also been the subject of national concern for some time.

Section 1 of the Project Act, 43 U.S.C. § 617, authorizes construction of "a main canal and appurtenant structures located entirely within the United States" to deliver water from the Colorado River to the Imperial and Coachella Valleys. While providing that there be no charge for the water or the "use, storage, or delivery" of the water, Section 1 requires that expenditures by the United States for the "main canal and appurtenant structures" be reimbursable "as provided in the reclamation law." Section 4(b) of the Project Act, 43 U.S.C. § 617c(b), mandates that reimbursement be secured by the Secretary of the Interior:

by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

Section 14 of the Project Act reinforces the command of Section 4(b) by providing that the "reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." 43 U.S.C. § 617m. The Project Act thus explic-

itly calls for the reclamation law to govern contracts for payment to the United States for the "construction, operation, and maintenance" of the All-American Canal.

The Project Act was approved December 21, 1928, and it became effective on June 25, 1929. At that time, the portion of the reclamation law governing contracts for payment of the costs of "constructing, operating, and maintaining" works on new reclamation projects was Section 46. Section 46 requires that such contracts provide that private lands in excess of 160 acres should not receive water from the reclamation project unless the owners agree to sell their excess lands according to the scheme set out in Section 46. By direct scrutiny of the statutory language, it is apparent that the acreage limitations of Section 46 apply to private lands in the Imperial Irrigation District that receive irrigation water from the All-American Canal.

The excess land provisions are an important cornerstone of the reclamation laws.³² Congress has exempted some projects from the operation of these provisions, but "the Congress has always made such exemption by express enactment." *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 292, 78 S.Ct. 1174, 1184, 2 L.Ed.2d 1313 (1958).³³ In the face of language directly mandating application of the excess lands provision of Section 46 to private lands in the Imperial Irrigation District, and in the absence of any language in the Project Act that is comparable to the example of a specific exemption used by the Supreme

³² One treatise has commented that "[a]creage limitation is, in every respect, the most important part of reclamation law." 2 Waters and Water Rights, § 120 at p. 209 (1967).

³³ Although referring to Section 5 of the Reclamation Act of 1902, this statement applies equally well to the excess land provision of Section 46 of the Omnibus Adjustment Act of 1926. The very example of a specific exemption used by the Supreme Court in fact referred specifically only to Section 46. See 68 Stat. 1190.

Court in the *Ivanhoe* case, the landowners nevertheless argue that various portions of the Project Act necessarily operate to create such an exemption. It is to these contentions that we now turn.

Under the Boulder Canyon Project Act, the Secretary of Interior has broad powers to allocate the waters of the Colorado River among the "Lower Basin" states of California, Nevada, and Arizona, and to determine which users within these states will receive water. The Secretary's authority to carry out these allocations is exercised through contracts made pursuant to Section 5 of the Project Act, 43 U.S.C. § 617d. Arizona v. California, supra, 373 U.S. at 580, 83 S.Ct. at 1487. One of the most significant limitations on this allocation power is that the Secretary is "required" by Section 6 of the Project Act to satisfy "present perfected rights in pursuance of Article VIII of said Colorado River Compact." Id. at 584, 83 S.Ct. at 1489; 43 U.S.C. § 617e. Article VIII of the Colorado River Compact provides that "[p]resent perfected rights to the beneficial use of water of the Colorado River System are unimpaired by this Compact."34 The term "present perfected rights" from the Colorado River Compact is thus incorporated into and made applicable to allocation of water under the Project Act. Arizona v. California, supra, 373 U.S. at 566, 83 S.Ct. 1468.36

³⁴ Section VIII of the Colorado River Compact also provides that the rights attached when storage of water reached a certain level. The text of the Compact can be found at 70 Cong.Rec. 324 (1928).

³⁶ The landowners also claim that Sections 8 and 13(c) of the Project Act make the Colorado River Compact applicable to the Act. However, the references to the Colorado River Compact in Sections 8 and 13(c) were used only to show that the Project Act did not change the Compact's division of water between the Upper and Lower Basins. *Arizona* v. *California*, *supra*, 373 U.S. at 566, 83 S.Ct. at 1480.

The Secretary's contractual powers under Section 5 of the Project Act are also limited by Section 14 of that Act which provides that "[t]his subchapter shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." 43 U.S.C. § 617m. It is the landowners' position that the qualifying clause of Section 14, "except as otherwise herein provided", subordinates Section 14 to other specific provisions in the Project Act that conflict with the reclamation laws. They further contend that Section 6 of the Act, in providing for the satisfaction of present perfected rights, necessarily conflicts with the application of excess land provisions of Section 46 and renders the latter provisions inapplicable in the Imperial Irrigation District.36

A "present perfected right" is a "water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works" as of June 25, 1929, the effective date of the Project Act. Arizona v. California, 376 U.S. 340, 341, 84 S.Ct. 755, 756, 11 L.Ed.2d 757 (1964).³⁷

³⁶ This argument overlooks the possibility that the Secretary may determine to allocate to the Imperial Irrigation District more water than the amount ultimately determined to be the District's present perfected rights. Water in excess of the District's present perfected rights would not be the subject of Section 6 of the Project Act and would not be protected by that Section from the operation of Section 46.

³⁷ As is clear from the discussion of Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, and Section 18 of the Project Act in *Arizona* v. *California*, *supra*, 373 U.S. at 586-587,83 S.Ct. 1468, not all rights to water under state law control the Secretary's decisions. "Present perfected rights" are thus not the equivalent of all forms of vested rights under state law.

In the case of the Imperial Valley, it therefore becomes necessary to determine the nature of the ownership of water rights under California law. Sexamination of California law on this point leads to the conclusion that the landowners' argument must be rejected and that satisfaction of present perfected rights is not incompatible with the application of the excess lands provision of Section 46.

No individual landowner in the Imperial Valley has filed a claim to water from the Colorado River under the terms of the Supreme Court's decree in Arizona v. California, supra, 376 U.S. at 351-352, 83 S.Ct. 1468, and there are no records of individual claims by Imperial Valley landowners for water rights as of June 25, 1929. Under California law, the Imperial Irrigation District holds legal title to the rights to Colorado River water in trust for the landowners. Merchants National Bank of San Diego v. Escondido Irrigation District, 144 Cal. 329, 334, 77 P. 937, 939 (1904). The water rights themselves are not held in trust for any individual landowner. The equitable ownership of the water rights is held in common by all the landowners in the District, Id. These principles of ownership have been specifically applied to the Imperial Irrigation District.

³⁸ It had been stipulated below by the government that the Imperial Irrigation District possessed present perfected rights, and we see no reason at this point to disturb this stipulation. While the exact quantity of these present perfected rights has not yet been determined, such an exact accounting is not necessary to this argument of the landowners. But, see footnote 36, supra.

³⁹ Three individuals filed notices of appropriation for the right to divert water for use in the Imperial Valley from the Colorado River between 1895 and 1899. Those notices were assigned to the California Development Company on the date they were recorded. The Imperial Irrigation District subsequently acquired all the assets of the California Development Company except for the latter's agricultural lands in Mexico.

Hall v. Superior Court, 198 Cal. 373, 383, 245 P. 814, 818 (1926).

The concept of an irrigation district's ownership of water rights in trust for the common benefit of landowners within the district is derived from the California doctrine that the use of appropriated water is a public use. Thus, the users of water, the rights to which are held by an irrigation district in trust for the common benefit, do not possess rights to the water that can be considered private property in the ordinary sense of the words, nor do the lands irrigated by that water thereby obtain any absolute right to the continued delivery of water. Landowners within an irrigation district do not possess as part of their freehold estates a proportionate ownership in the water rights owned by the irrigation district. The right of any individual landowner to the use of water, which must be a public use. comes about by reason of the landowner's status as a member of the class for whose benefit the water has been appropriated. Madera Irrigation District v. All Persons, 47 Cal.2d 681, 691-693, 306 P.2d 886, 892-893 (1957), reversed on other grounds sub nom., Ivanhoe Irrigation District v. McCracken, supra; Jenison v. Redfield, 149 Cal. 500, 87 P. 62 (1906).

A consequence of this rule is that no particular landowner or particular piece of land is entitled to use any particular proportion of the water to which the irrigation district owns rights. As new landowners and as new lands come within the jurisdiction of the irrigation district, they are entitled to use their proper share of the water, and the shares of all landowners would have to be redistributed. Madera Irrigation District v. All Persons, supra, 47 Cal.2d at 692, 306 P.2d at 893.

It follows that all the present perfected rights owned by the Imperial Irrigation District as of June 25, 1929, are not water rights owned by any particular landowner. Satisfaction of the Imperial Irrigation District's present per-

fected rights by the Secretary of the Interior in the allocation of Colorado River water therefore only concerns the total quantity of water to be supplied to the Imperial Irrigation District and does not concern supplying any particular amount of water due to any particular landowner. The excess land provisions of Section 46, however, apply only to individual landowners and do not, under the Project Act, apply to the Imperial Irrigation District as the owner of water rights in trust for the common benefit. Excess lands of a particular landowner could be deprived of water without reducing the total amount of water delivered to the Imperial Irrigation District. The District would have to redistribute its deliveries if certain lands became ineligible for delivery of water, but the satisfaction of the District's total present perfected rights would not be impaired by the operation of Section 46. Furthermore, redistribution of deliveries in accord with the excess lands provisions of Section 46 would not violate the trust under which the Imperial Irrigation District owns the water rights for the common benefit. Ivanhoe Irrigation District v. All Parties and Persons, 53 Cal.2d 692, 712, 3 Cal.Rptr. 317, 329, 350 P.2d 69, 81 (1960). Section 6 of the Boulder Canyon Project Act, therefore, does not preclude application of the excess lands provision of Section 46 of the Omnibus Adjustment Act of 1926.

The landowners next argue that the overall scheme of the Boulder Canyon Project Act is inconsistent with Section 46.40 They point out that Section 46 combines a variety of provisions while the Project Act is composed of different sections dealing separately with different subjects. In itself, this hardly makes the two statutes incompatible. Section 4(b) of the Project Act, 43 U.S.C. § 617c(b), required the Secretary of the Interior to make provisions

⁴⁰ This argument would apply to all water deliveries through the All-American Canal, including delivery to the Coachella Valley. Cf. footnote 36, *supra*.

for reimbursement revenues before money was appropriated or construction began on the Canal, while Section 46 permits execution of a repayment contract upon completion of the project but before commencement of water deliveries. In this respect, the Project Act's modification of Section 46 deals only with the time for securing repayment and does not mean that all other substantive provisions of Section 46 are incompatible with the Project Act.⁴¹

The landowners point out that Sections 1 and 4(b) of the Project Act require reimbursement only for the capital costs of the "main canal and appurtenant structures to connect the Laguna Dam" while exempting users in the Imperial Valley from repayment obligations for the costs of water storage facilities. 43 U.S.C. §§ 617, 617c(b). Nevertheless, the Project Act still required reimbursement of substantial sums of money. This partial relaxation of Section 46's requirement of reimbursement of the capital costs of all project works does not make the other provisions of Section 46 inapplicable. The landowners also note that Section 46 requires a contract while Section 4(b) of the Project Act requires the Secretary to insure repayment "by contract or otherwise." Whatever might be the case if the Secretary had "otherwise" insured repayment, the method chosen in the case of the Imperial Valley was a contract.42

⁴¹ Similarly, we attach no significance in this context to the fact that Section 2(a) of the Project Act, 43 U.S.C. § 617a(a), establishes a special fund, the Colorado River Dam Fund, that is not envisioned by Section 46 and that is to receive all payments made for projects constructed pursuant to the Act.

[&]quot;The landowners fail to note that if the Secretary "otherwise" insures repayment, Section 4(b) still requires that it be done "in the manner provided in the reclamation law" and that at the time the contract was made there was no means authorized by the reclamation law, other than the type of contract involved here, for insuring repayment.

The landowners further argue that Section 5 of the Project Act, 43 U.S.C. § 617d, prescribes conditions to govern water delivery contracts and that this Section requires the contracts to conform to Section 4(a) of the Project Act, 43 U.S.C. § 617c(a). They then argue that Section 4(a) contemplates the unconditional delivery of water to satisfy present perfected rights and says nothing about conforming to the reclamation laws. Sections 1 and 4(b) of the Project Act, they argue, contain references to reimbursement "as provided in reclamation law", but the landowners argue that these provisions are distinct from the provisions governing the delivery of water in Sections 4(a) and 5. They argue that it would be logical to place a condition that the delivery of water be subject to the reclamation laws in the section of the Project Act specifically governing such deliveries and that the failure to place such a condition in that section (and specifically placing such a condition in another section of the Project Act) means that there is no such condition on deliveries under Section 5.

This argument overlooks the fact Section 4(a) deals with interstate allocations of water and that conditions on the Secretary's authority under Section 5 are also contained in other sections of the Project Act. For example, Section 6, as previously urged by the landowners, is a significant limitation upon the authority conferred by Section 5. Similarly, as discussed previously, Section 14 is also a significant limitation. The Section 4(a) limitation specifically incorporated into Section 5 is no stronger than the Section 6 limitation that is not specifically referred to in Section 5, and, as held earlier, the Section 6 limitation is not incompatible with the application of the excess lands provision of Section 46.

The landowners' next argue that Section 14 of the Project Act applies, by its terms, only to the "construction, operation, and management" of project works and not to the delivery of water. They claim that these terms refer

only to the business and fiscal aspects of the project and not to matters of "social control" such as acreage limitations. They claim their argument is bolstered by the fact that the Project Act employs language in other sections that distinguishes between "construction, operation, and maintenance" and "delivery" of water.43 This argument overlooks the fact that the contracts with irrigation districts required by Section 46 are themselves only for the reimbursement of the "cost of constructing, operating, and maintaining the works during the time they are in control of the United States" and that the Section 46 contracts with the irrigation districts are not for delivery of water. The requirement that excess lands shall not receive water is a condition, basic to achieving a central purpose of the reclamation laws, to be incorporated into a Section 46 contract with an irrigation district for "construction, operation, and maintenance" of a project. Under the Project Act, Imperial Valley landowners were only required to reimburse the United States for the "construction, operation, and management" expenses connected with the All-American Canal. They were not to be charged for any portion of the construction of Boulder Dam (the main storage dam) or for the use or delivery of the water. It was natural, therefore to have separate provisions dealing with the delivery of water, where no reimbursement was required, and with the construction of the Canal where reimbursement was required. With regard to the latter, as has previously been discussed, not only Section 14 but Sections 1 and 4(b) of the Project Act mandate application of Section 46 to reimbursement contracts. In this context.

⁴³ Compare Section 10, 43 U.S.C. § 617i, with Section 5, 43 U.S.C. § 617d, and Section 1, 43 U.S.C. § 617, with Section 4(b), 43 U.S.C. § 617c(b). See also Section 7, 43 U.S.C. § 617f. However, Section 8(b), 43 U.S.C. § 617g(b), appears to include delivery and use of water within the activities of construction, operation, and management. This argument would apply to all water deliveries through the All-American Canal. See footnotes 36, 40, *supra*.

any differentiation in Project Act provisions for delivery of water and construction of the Canal is nothing more than a reflection of the fact that the Imperial Valley did not have to fully repay the United States for the benefits received under the Act but that repayment contracts for the benefits that did have to be reimbursed still had to be in accord with the reclamation law and Section 46.

The final statutory construction argument asserted by the landowners is based on Section 9 of the Project Act which provides for the disposition of public lands that could be practically irrigated and reclaimed by the project works authorized by the Act. 43 U.S.C. § 617h. This Section directed the Secretary to withdraw these public lands from entry and authorized re-opening them to entry at a later date. Lands subsequently opened for entry were to be in tracts in various sizes to be determined by the Secretary, with no tract larger than 160 acres. Section 9 also granted an exclusive entry preference to veterans for a period of three months, subject to the qualifications requirements of 43 U.S.C. § 433. The landowners argue that references in Section 9 to other statutes would not have been necessary if Section 14 of the Project Act generally incorporated the reclamation laws into the Act. They then argue that the specific references to other statutes in the Section of the Project Act dealing with public lands and the absence of any specific provisions dealing with excess private lands means that the excess lands provisions of Section 46 cannot apply to private lands benefiting from the Act.

The landowners are reading too much significance into Section 9's references to other statutes. The reference to a 160-acre limit on tracts of public land merely limits the Secretary of the Interior's discretion in determining tract sizes. Otherwise, Section 9 requires the opening of public lands for entry "in accordance with the provisions of the reclamation law"—a general reference to reclamation law

similar to the general reference in Section 14. Similarly, the exclusive preference given to veterans by Section 9 has no counterpart in the general homestead laws, as incorporated into the reclamation law by 43 U.S.C. § 432,4 so this preference had to be qualified by a specific reference to 43 U.S.C. § 433. To use these two minor qualifications by reference in Section 9 to create an exemption for private lands from the excess land laws in face of the strong national policy of generally enforcing those laws, the specific incorporation of reclamation law in Section 14 of the Act, and the lack of any specific exemption from the operation of the excess land laws in the Project Act puts a far too strained reading on Section 9 which cannot be accepted.

V. Legislative History.

A series of bills introduced by Congressman Swing and Senator Johnson (both of California) in the 67th, 68th, 69th, and 70th Congresses, and known as the Swing-Johnson bills, culminated in the passage of the Project Act by the 70th Congress in December of 1928. The bills generated a great deal of controversy, especially because of the opposition of Arizona's Congressional delegation. However, despite hearings by committees of both the House and Senate considering each series of Swing-Johnson bills and extensive debates on the fourth and last Swing-Johnson measure that ultimately became the Project Act, the legislative history concerning the acreage limitation provisons of the reclamation laws is relatively meager. In reviewing this history, it is important to remember that

[&]quot;The time limit on preferences when the Project Act was passed was, in the discretion of the Secretary of the Interior, 90 days or more. See 42 Stat. 358 (January 21, 1922), later codified without relevant change as 43 U.S.C. § 186. Section 9 of the Project Act limits the preference period to exactly three months. (Except for lands in Alaska, the homestead laws were repealed effective October 21, 1976, by Public Law 94-579, Title VII, § 702, 90 Stat. 2787.)

the landowners seek to find in it a specific exemption that cannot be found in the actual language of the Project Act.

The relevant legislative history begins with the third series of Swing-Johnson bills introduced during the 69th Congress. A bill introduced by Congressman Swing, H.R. 6251, was referred to the Department of the Interior, redrafted, and re-introduced as H.R. 9826. As redrafted, H.R. 9826 contained a provision identical to that eventually enacted as Section 14 of the Project Act.

During hearings on that bill, Congressman Swing informed a House committee that, in his opinion, the bill did not require a private landowner to sell lands in excess of 160 acres at prices to be fixed by the Secretary of the Interior. This statement was not made with reference to any particular portion of the bill. It was accompanied by Congressman Swing's misleading testimony that there were only one or two large landholdings in the Imperial Valley. At the same time, the Commissioner of the Bureau of Reclamation told the committee that the bill permitted landowners to retain their farms intact no matter how large their holdings. However, he added that "old" lands, i.e., lands presently irrigated without the benefit of a federal reclamation project, would be sold water under a Warren contract. 47

⁴⁵ The landowners rely on a brief exchange during committee hearings in 1924 on the second Swing-Johnson bill. However, this bill was never reported out of committee.

⁴⁶ While the average size of an Imperial Valley farm in the 1920s may have been less than 160 acres, there were several over 320 acres. Taylor, *Water, Land, and Environment, etc.* 13 Natural Resources Journal 1, 4 (1963).

⁴⁷ Hearings on H.R. 6251 and H.R. 9826, 69th Cong., 1st Sess. (1926) at pps. 32-33. It should be noted that the Commissioner also testified that there were several large landholdings in the Imperial Valley.

The Commissioner was referring to the Warren Act, 43 U.S.C. §§ 523-525.48 Under that Act, water stored by a federal reclamation project in excess of the needs of that project could be delivered by contract to an irrigation district. However, that water could not be used "otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects." 43 U.S.C. § 523. Furthermore, the Warren Act, while not including a divestiture provision such as the one in Section 46, does provide that landowners cannot receive water in excess of an amount sufficient to irrigate 160 acres. 43 U.S.C. § 524.

The committee was thus being told by the government agency responsible for drafting H.R. 9826 that there was no applicable divestiture provision for excess lands but that the general language incorporating the reclamation law incorporated the Warren Act which did limit the amount of water a landowner could receive. It is significant that these hearings were held in February and March of 1926 while Section 46 was not enacted into law until May of 1926.

After completion of the House hearings, the committee amended H.R. 9826 by adding a specific acreage limitation provision similar to the divestiture provision of Section 46. There is no contemporaneous explanation of the committee's reasons for adding this provision. However, in light of the view presented to the committee that the project to build the All-American Canal was viewed as a "supplemental" one subject only to the restrictions in the Warren Act, the amendment can most reasonably be construed as a decision to add an additional restriction to those already

⁴⁹ Congressman Swing's testimony is not inconsistent with that of the Commissioner because the Congressman discussed only divestiture of excess acreage.

⁴⁸ Act of February 21, 1911, ch. 141, 36 Stat. 925.

contained in the Warren Act. The bill was reported favorably to the House, but it never came up for a vote.

Meanwhile, a bill sponsored by Senator Johnson, S. 3331, was favorably reported out of committee. Although the committee report did not specifically discuss the acreage limitation question, it did note that a provision in the bill essentially the same as what eventually became Section 14 of the Project Act, made the reclamation law applicable where not inconsistent with other portions of the statute. The report noted that "[i]n a great project as this many details may properly be referable to a general law such as the reclamation act."50 During the Senate debates on the bill, Senator Johnson emphasized that the bill was to be part of the reclamation law.51 Although made in the context of assuring Arizona's senators that Arizona's water rights would be protected, it could hardly have escaped the attention of the Senate that by that time the reclamation law also required significant acreage limitations in its provisions for contracts with irrigation districts. Shortly thereafter, Senator Phipps of Colorado introduced an amendment to S. 3331 and a new bill as a substitute to S. 3331. Both proposals included provisions specifically incorporating acreage limitation provisions similar to Section 46 into the bill's provisions for delivery of water. Neither Senator Phipps' proposals nor S. 3331 were ever the subject of a vote in the Senate.

During the 70th Congress, Congressman Swing and Senator Johnson renewed their efforts. A House bill, H.R. 5773, containing the specific acreage limitation provision previously added by the House committee to H.R. 9826 in the 69th Congress was passed and sent to the Senate. In the meantime, a Senate bill, S. 728, sponsored by Senator

⁵⁰ Senate Report No. 654, 69th Cong., 1st Sess. (1926) at p. 28.

^{51 68} Cong.Rec. 4291-4292 (February 21, 1927).

Johnson, was being considered by the Senate. It contained a provision identical to Section 14 of the Project Act but did not contain the specific acreage limitation provision found in H.R. 5773. While the Senate version was ultimately adopted, the circumstances surrounding the decision to accept the Senate version do not give rise to a conclusion that the Project Act specifically exempts the Imperial Valley from the application of the acreage limitation provisions of the reclamation law.

Senator Johnson's proposal, S. 728, was considered in committee along with S. 1274, a bill proposed by Senator Phipps. The Phipps bill included an express requirement that acreage limitation provisions be incorporated in water delivery contracts while the Johnson bill contained only the general reference to reclamation law eventually enacted as Section 14 of the Project Act. The Johnson bill was reported to the Senate, but the committee did not report the Phipps bill. The Secretary of the Interior objected to the Phipps bill because of its failure to adequately provide for the development of hydroelectric power, and his objections were incorporated into the report on Senator Johnson's bill. In addition, the Secretary's opinion that the Johnson bill, containing no specific acreage limitation provision, was similar to H.R. 5773, which did contain such a specific provision, was also incorporated into the Senate report on the Johnson bill.52

When S. 728 reached the floor of the Senate, it was the subject of a lengthy filibuster. During the course of the debates, Senator Hayden of Arizona, one of the bill's most

⁵² Senate report No. 592, 70th Cong., 1st Sess. (1928) at pps. 30-31. Nevertheless, Senator Ashurst of Arizona attached a minority report that alleged, *inter alia*, that the committee had not included his proposed amendment to the bill that would have added a specific acreage limitation provision. *Id., Minority Views* at p. 26. This problem receives only two brief references in a minority report of some 38 pages.

ardent opponents, claimed that the bill failed to provide acreage limitations on privately owned lands receiving irrigation water as the House bill did and proposed an amendment that would contain a specific provision comparable to the one in the House bill. This was one of many amendments sponsored by the two senators from Arizona. There was no discussion of the amendment and the Senate never voted on it. The first session of the 70th Congress adjourned in May of 1928 without the Senate ever voting on Senator Johnson's bill.

When the second session of the 70th Congress began in December of 1928. Senator Johnson immediately moved to substitute H.R. 5773, already passed by the House, for S. 728 and then amend H.R. 5773 by retaining only the enacting clause and substituting S. 728 for the body of the bill. Senator Johnson assured the Senate that he wished only to "preserve orderly legislative procedure" and that the two bills contained "like purposes" and "like designs."54 The Senate unanimously consented to his request. Senator Hayden then made a speech and engaged in an extended colloquy with Senator Johnson and others over what Senator Hayden considered the significant differences between the bill passed by the House and the Senate version which had been substituted for the House bill. It is noteworthy that at this time Senator Havden never mentioned the absence of a specific acreage limitation provision as being a significant difference between the Senate and House bills.55

During the entire debate in the Senate's second session extending from December 5, 1928, until the Senate passed

⁵³ 69 Cong.Rec. 7634-7635 (May 2, 1928). See also 69 Cong.Rec. 9451 (May 22, 1928).

^{54 70} Cong.Rec. 67 (December 5, 1928).

^{85 70} Cong.Rec. 71-81 (December 5, 1928).

the bill on December 14, 1928, the acreage limitation issue was mentioned only once. Senator Ashurst complained that the bill allowed irrigation water to be delivered to landholdings in excess of 160 acres. 56 However, he made only a brief passing reference to the issue in a speech opposing the bill that extends over some 32 pages in the Congressional Record. 57 During the Senate debates in December of 1928, several amendments to the bill were brought up for a vote, but there were no votes on amendments that would have added more specific acreage limitation provisions to the bill.58 Allocation of water from the Colorado River and control of hydroelectric power facilities were the predominant concerns of the bill's opponents. When the House considered the Senate bill and concurred in it on December 18, 1928, there was again no mention of the acreage limitation issue or the deletion of the specific acreage limitation by the Senate.

^{56 70} Cong.Rec. 289 (December 8, 1928).

⁵⁷ 70 Cong.Rec. 277-298, 314-323 (December 8 and 10, 1928).

⁵⁸ The landowners emphasize the origin of Sections 4 and 5 of the Project Act, claiming Congress chose to have Section 5 contracts for the delivery of water be governed by Section 4(a) rather than by a general reference to the reclamation law. In addition, they point out that an amendment to Section 4(b) proposed by Senator Pittman was modified because of Senator Johnson's objections. The modification eliminated requiring delivery of project water in accord with the reclamation laws. See 70 Cong.Rec. 526, 577 (December 13 and 14, 1928). However, the effect of the Pittman amendment was to require the All-American Canal to be paid for under the terms of the reclamation law but without charging for the storage and delivery of the water. See 70 Cong.Rec. 576 (December 14, 1928). The end result was to adopt a provision similar to the proposal of Senator Ashurst cited on page 102 of the Landowners' Joint Consolidated Brief. In any event, as previously discussed, there is no incompatibility between Sections 4 and 5 of the Project Act and the application of Section 46.

Evaluation of this legislative history does not lead us to conclude that Congress intended to exempt lands receiving water carried by the All-American Canal from the acreage limitations of Section 46. On the contrary, the legislative history indicates that the problem did not receive the extended Congressional consideration that would be normally thought appropriate if an exemption to an important part of the reclamation law was being created. Furthermore, the legislative history can be interpreted as giving a positive indication that Congress intended that acreage limitation provisions be incorporated by the general references to reclamation law that were included in the Project Act. A specific acreage limitation was included in the bill sent to the House during the 69th Congress after witnesses at the committee hearings claimed that, as originally drafted, there were no such provisions in the bill. During the 69th and 70th Congresses, the House passed a bill with a specific acreage limitation provision. During the 70th Congress, the Senate was told through a committee report and by the sponsor of the legislation that its bill was substantially the same as the bill passed by the House. There was no objection in the House when it considered the Senate bill with its general incorporation of reclamation law rather than the specific language previously used in the House version of the legislation. All this points to an interpretation opposite to that urged by the landowners.

In support of their position, therefore, the landowners must rely on such evidence as the failure of the Senate committee to adopt Senator Ashurst's proposed amendment or Senator Phipps' proposed bill and the failure of the Senate to adopt Senator Hayden's proposed amendment. However, statutory interpretation cannot rest on unexplained actions of a Congressional committee. 59 Simi-

⁵⁹ To the extent that there is an explanation for any of these committee actions, it is that the Phipps bill was rejected as in adequate for reasons unrelated to the acreage limitation provision.

larly, we cannot interpret a statute based on inferences the landowners seek to draw from proposed amendments to legislation that were never brought to a vote or even seriously debated on the floor. It could just as reasonably be inferred that the amendments were not adopted because the legislation was considered to have already incorporated the proposed changes. United States v. Wise, 370 U.S. 405, 411, 82 S.Ct. 1354, 8 L.Ed.2d 590 (1962), Cf. National Automatic Laundry and Cleaning Council v. Shultz, 143 U.S.App.D.C. 274, 443 F.2d 689, 706 (D.C. Cir.1971). The landowners also rely on statements of the bill's opponents. This type of evidence may be reliable when circumstances indicate the opponents' statements correctly indicate the views of the bill's proponents, Arizona v. California, supra, 373 U.S. at 583 n. 85, 83 S.Ct. 1468. However, in this case there is positive evidence that the bill's opponents were incorrect and their objections, at least on the part of Senator Hayden, were not maintained throughout the course of the debates. In view of all the circumstances reviewed above, we cannot rely on a few statements of opponents during the course of lengthy proceedings primarily concerned with other aspects of the proposed legislation as the correct version of the Project Act's legislative history. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 n. 24, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976).

The landowners seek to bolster their argument by claiming that Congress was not concerned with lands already irrigated by private efforts when it passed Section 46. They contend that Section 46 was designed only to prevent speculative profits made on unimproved arid lands that became part of a federal reclamation project. Since Congress was unconcerned with productive lands such as those in the Imperial Valley when Section 46 was passed, their argument goes, Congress was not violating any basic policy when shortly thereafter it exempted the Imperial Valley from the acreage limitations in Section 46. If this interpretation of Section 46 were correct, there would be

less of a need to find a specific exemption for the Imperial Valley in the legislative history.⁶⁰

The landowners' interpretation of Section 46, however, is not correct. The statutory language makes acreage restrictions specifically applicable to all private lands receiving water through federal reclamation projects and makes no distinction between lands previously unproductive and lands previously productive because irrigated by non-federal projects. Congress was well aware when it passeed Section 46 that many federal reclamation projects were initiated to supplement or replace non-federal irrigation projects, as was done in the Imperial Valley. Section 46 was designed to strengthen both the anti-speculative and anti-monopoly policies of the reclamation laws, and there is no question that Congress intended it to apply to previously irrigated and productive lands such as those in the Imperial Valley. United States v. Tulare Lake Canal Co., supra, 535 F.2d at 1112-1113, 1119, 1121 at n. 107, 1132.

It is usually true that most of the land included in a reclamation project is privately owned; it is usually true that the private lands are already under irrigation through facilities developed at private expense; it is usually true that the reclamation project only supplements or regulates existing water supplies.

Id. at 1143.

VI. Administrative Practice.

The landowners next claim that the actual practice of the Department of the Interior supports their position. Relying on both a legal interpretation favorable to their position and the lack of Department enforcement of the excess lands provision of Section 46, they argue that this administrative practice is entitled to great, if not conclu-

⁶⁰ The logical extension of this argument would in fact be that acreage limitations would not apply unless Congress specifically mandated such a result.

sive, weight in the statutory construction of the Project Act, has been ratified by Congress, and has been relied upon to such an extent that it cannot now be changed.

The legal interpretation upon which the landowners rely is a letter from Ray Lyman Wilbur, Secretary of the Interior, to the Imperial Irrigation District dated February 24, 1933.⁶¹ It is important to examine this letter carefully before evaluating the landowners' claims.

The letter begins by referring to the then-pending suit of Malan v. Imperial Irrigation District and the allegation therein that, under the reclamation law, water cannot be delivered from the All-American Canal to any landowner owning more than 160 acres of land. Secretary Wilbur states that the allegation in the Malan litigation is an inaccurate statement of the reclamation law but that the allegation presumably refers to Section 5 of the Reclamation Act of 1902. The Wilbur letter asserts that Section 5 provides that no water shall be sold except under certain conditions but does not provide that no water shall be delivered from a canal constructed by the government and that the Project Act and the contract with the Imperial Irrigation District do not concern the sale of water and further provide that there will be no charge for the delivery of water.

This portion of the Wilbur letter, whether legally correct or not,⁶² is irrelevant to the present case. It concerns only the applicability of Section 5 of the Reclamation Act of

⁶¹ The letter is reprinted as Appendix E to Opinion M-36675, Applicability of the Excess Land Laws [to] Imperial Irrigation District Lands, 71 I.D. 496, 529 (1964) (hereinafter referred to as the Barry opinion.)

⁶² The landowners advance this argument to justify reversal of Judge Murray's decision in the residency case. Judge Murray had rejected such an argument. Yellen v. Hickel, supra, 352 F.Supp. at 1305-1306.

1902. It does not purport in any way to consider Section 46 of the Omnibus Adjustment Act of 1926. The reasoning of this section of the Wilbur letter cannot apply to Section 46 because that statute does not speak in terms of the sale of water.

The next portion of the Wilbur letter states that the question of the application of the 160-acre limitation had been carefully reviewed and the conclusion had been reached that the limitation did not apply to lands "now cultivated and having a present water right." This conclusion is then justified by the argument that Congress recognized that lands in the Imperial Valley had vested water rights when it provided that there be no charge for storage, use, or delivery of water and that previous decisions of the Bureau of Reclamation had held that Section 5 of the Reclamation Act of 1902 did not prevent recognition of vested water rights for areas larger than 160 acres and that it permitted continued delivery of water to satisfy vested water rights in single ownerships larger than 160 acres. 44

While this second argument is directed only at Section 5 of the Reclamation Act of 1902 and never mentions Section 46 of the Onmibus Adjustment Act of 1926, a variation of that argument with respect to Section 46 has been asserted as one of the landowners' main arguments, i. e., that the recognition of "present perfected rights" by the Project Act is incompatible with the application of the excess lands provision of Section 46. Significantly, however, the Wilbur letter makes no mention of the other landowners' assertions concerning the purported incon-

^{63 71} I.D. at 530.

⁶⁴ Intertwined with this argument is the assertion, previously discussed, that Section 5 of the Reclamation Act of 1902 cannot apply because no sale of water is involved.

sistencies between the Project Act's reimbursement provisions and Section 46, the inapplicability of the excess lands provision of Section 46 because of the restricted incorporation of reclamation law by Section 14 of the Project Act, and the inapplicability of Section 46 by implication because of the public lands provisions of Section 9 of the Project Act. As to these arguments, the Wilbur letter, no matter how convincing or dubious its reasoning, can provide absolutely no support.

This letter cannot be given the weight the landowners seek. The letter was written after the Department of the Interior contracted with the Imperial Irrigation District. There is no evidence that the Department reached a conclusion before entering into the contract that the 160-acre limitation did not apply in the Imperial Valley. After a search by the Department, the only positive evidence that was uncovered on this question was that before the execution of the contract the Department had actually taken the position that the excess land laws would apply in the Imperial Valley.65 The Wilbur letter was in response to a request for a ruling by the Imperial Irrigation District, which hoped to receive a formal ruling that acreage limitations did not apply but did not want a formal ruling if the conclusion came out the other way. 66 No formal opinion on this issue was prepared by the Solicitor of the Department at that time.67

^{65 71} I.D. at 509 n. 25.

⁶⁶ Id.

⁶⁷ After the Wilbur letter was issued, representatives of the Imperial Irrigation District expressed concern that the letter did not discuss the applicability of Section 46 of the Omnibus Adjustment Act of 1926. A letter from Porter W. Dent, Assistant Commissioner and Chief Counsel of the Bureau of Reclamation, to the Bureau's Regional Counsel in Los Angeles, dated March 1, 1933, took the position that the same principle discussed in the Wilbur letter with respect to Section 5 of the Reclamation

Doubts as to the legal validity of the Wilbur letter arose within the Department in 1944. The Coachella Valley in California also received water through the All-American Canal. The original contract with the water district in that Valley contained no specific provisions for enforcement of the excess land laws. During negotiations for a supplemental Coachella contract, the Bureau of Reclamation, believing that the acreage limitations applied, requested a formal ruling from the Solicitor.68 The resulting opinion of Solicitor Fowler Harper, approved by the Secretary of the Interior in 1945, determined that the excess land provisions of the reclamation laws applied in the Coachella Valley and that nothing in the Boulder Canyon Project Act precluded their application to that Valley. The Harper opinion criticized the Wilbur letter as an informal decision designed to help the Imperial Irrigation District in the litigation then pending in state court concerning the validity of the District's contract. However, the Harper opinion did not directly overrule the Wilbur letter. Instead the Wilbur letter was distinguished on the basis that it applied only to the Imperial Valley and did not cover the Coachella Valley.69

After the Harper opinion was issued, the Veterans of Foreign Wars inquired in 1948 about the inconsistency of application of the 160-acre limitation in the Imperial and Coachella Valleys. The Secretary of the Interior at that time, Julius A. Krug, responded in a letter which did not attempt to legally justify or explain any inconsistencies between the Harper opinion and the Wilbur letter. Instead,

Act of 1902 applied to Section 46. See Appendix F to the Barry opinion, 71 I.D. at 531-532. There is no claim that this letter should be considered as an administrative construction of the Project Act to which the courts should defer.

^{68 71} I.D. at 514.

⁶⁹ Solicitor's Opinion, M-33902 (May 31, 1945), found as Appendix H to the Barry opinion, 71 I.D. at 533-548.

Krug justified the non-application of the 160-acre limitation in the Imperial Valley on the ground that owners and subsequent purchasers of land in the Imperial Valley were entitled to rely upon the Wilbur letter and it would be unfair to change the situation even though the legal validity of the conclusions in the Wilbur letter might be questionable.⁷⁰

In 1958, the question of the application of the 160-acre limitation in the Imperial Valley arose in proceedings before the special master appointed by the Supreme Court in the Arizona v. California litigation. The special master requested memoranda on the question and the Solicitor General then sought the views of the Solicitor of the Department of the Interior, Elmer F. Bennett. Solicitor Bennett's reply doubted that the acreage limitation question was relevant to the issues before the special master. Bennett's reply also came to essentially the same conclusion reached by Secretary Krug in 1948. Without undertaking any legal analysis of the issue, he concluded that water had been delivered pursuant to the contract since the early 1940s, that no legal challenge to the contract had been raised since the state court confirmation proceedings, that no administrative action had ever been taken to enforce the acreage limitation, and that it was no longer realistic and practicable to enforce that law even if it should have been enforced. The Solicitor General then filed a memorandum with the special master taking the position that noncompliance with the acreage limitations was not relevant to the issues before the special master. In a footnote, however, the Solicitor General's memorandum concluded that the acreage limitations of the reclamation laws applied to privately owned lands in the Imperial Valley receiving water from the All-American Canal.71

^{70 71} I.D. at 515.

^{71 71} I.D. at 515-516.

The only legal analysis of the Department of the Interior, therefore, which supports the landowners' interpretation of the Project Act is the Wilbur letter of 1933. That letter does not purport to deal with the questions of interpretation raised in this case. The Department of the Interior itself began to have doubts about the legal soundness of the Wilbur letter's conclusions shortly after water deliveries through the All-American Canal began in the early 1940s but continued to adhere to the practice of nonenforcement of acreage limitations in the Imperial Valley because of its previous practice of nonenforcement. Finally, the legal validity of the conclusions in the Wilbur letter were specifically rejected by the Department of the Interior in 1964.

A thorough and comprehensive opinion by Solicitor Frank J. Barry was prepared in response to Congressional inquiries in 1961 and 1964.72 The opinion specifically rejected the legal basis set forth in the Wilbur letter for concluding that Section 5 of the Reclamation Act of 1902 still permitted deliveries of water to excess lands that had vested water rights prior to the initiation of the reclamation project. The precedents cited in the Wilbur letter were actually special cases where the government acquired existing physical irrigation facilities for incorporation into a reclamation project and were not applicable in the Imperial Valley. The Barry opinion considered the language of the Project Act, its legislative history, the Wilbur letter and previous administrative practices and concluded that privately owned lands in the Imperial Irrigation District are subject to the excess land laws.

The landowners seek to elevate the legal conclusions reached in the Wilbur letter into the binding force of law. Without setting forth the facts in each of the cases upon which they rely, it suffices to say that such a proposition

⁷² The Barry opinion, fn. 61, supra.

is far too broad. The appropriate deference to be accorded an administrative construction of a statute is that a "consistent and longstanding" interpretation of a Congressional enactment by an agency charged with administration of that statute is entitled to "considerable weight" but it does not control the decisions of the courts. *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975). The ultimate responsibility of interpreting the language of Congress resides in the courts. *Zuber v. Allen*, 396 U.S. 168, 193, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969).

In the case of the Wilbur letter, there is an informal opinion reached under circumstances indicating a lack of careful consideration. It does not purport to even consider the portion of the reclamation law in question in this case. The legal conclusions of the Wilbur letter have not been consistently held to be correct by the Department of the Interior. Most if not all of its reasoning was implicitly rejected in the Harper opinion of 1945 and it was explicitly rejected in the Barry opinion of 1964. The Wilbur letter does not construe ambiguous or doubtful language in the Project Act but in a rather simplistic analysis not contained in a formal opinion purports to find an inconsistency between two different statutes. It is an interpretation made after enactment of both statutes and consequently never before Congress when the Project Act was being considered. In these circumstances, insofar as the application of the excess lands provision of Section 46 of the Omnibus Adjustment Act of 1926 is concerned, the Wilbur letter is not entitled to any deference as a proper construction of the Project Act and reclamation law. Cf. General Electric Co. v. Gilbert, 429 U.S. 125, 141-142, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976); Shea v. Vialpando, 416 U.S. 251, 262 n. 11, 94 S.Ct. 1746, 40 L.Ed.2d 120 (1974); Zuber v. Allen, supra, 396 U.S. at 192-193, 90 S.Ct. 314; Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 41 n. 27, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977).

It is true that, in practice, the Department of the Interior did not enforce the 160-acre limitation on lands in the Imperial Irrigation District. This inaction was based at first upon the Wilbur letter which was itself an informal opinion that is legally incorrect and that does not even deal with the reclamation statute at issue in this case. Sometime thereafter, the Department of the Interior abandoned justifying its inaction on the analysis contained in the Wilbur letter but instead decided against nonenforcement of the 160-acre limitation because it had not been enforced before. Inaction based on previous inaction cannot be elevated into an administrative determination to which the courts should defer.⁷³

The landowners contend that the "consistent" administrative interpretation that the 160-acre limitation did not apply to private lands in the Imperial Valley was brought to the attention of Congress and that Congressional failure to object amounts to a Congressional ratification of the Wilbur interpretation of the Project Act. Such a sweeping claim fails to stand up in light of an analysis of what can actually be considered to have been brought to the attention of Congress and the manner in which this occurred.

Many of the references in committee hearings upon which the landowners rely are brief references to the situation in the Imperial Valley contained in lengthy considerations of completely different reclamation projects such as the San Luis or Central Valley Projects. The claim of an exemption from application of the acreage limitations to private lands in the Imperial Valley was often raised by advocates of exemptions in allegedly similar situations in attempts to persuade Congress to specifically place such

⁷³ Administrative practice plainly contrary to the law may be overturned no matter how long standing. Baltimore & Ohio R. Co. v. Jackson, 353 U.S. 325, 77 S.Ct. 842, 1 L.Ed.2d 862 (1957); United States v. E. I. duPont de Nemours & Co., 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957).

an exemption in another reclamation project. Rejection, or even acceptance, of an exemption claim for another project hardly amounts to deliberate Congressional consideration of the situation in the Imperial Valley. The same holds true for brief references to the Imperial Valley in government reports sent to various Congressional committees.

The best evidence the landowners can muster on this argument concerns the 1958 hearings before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs reviewing the acreage limitation provisions in the reclamation law.74 The subcommittee was concerned with the future shape of the reclamation law in general and the application of acreage limitation provisions to a small number of new projects in particular. It was not concerned with legislation for the Imperial Valley. The situation in the Imperial Valley and the Wilbur letter were brought to the subcommittee's attention. Counsel for the Imperial Irrigation District testified shortly after appearing before the Supreme Court in the Ivanhoe Irrigation District v. McCracken litigation. His testimony echoed the theory concerning vested water rights that was enunciated by the California Supreme Court in that series of cases and was later rejected by the Supreme Court. These circumstances cannot amount to Congressional ratification by silence of the Wilbur interpretation. Significantly, the chairman of the subcommittee, Senator Anderson, was the Senator who later initiated the Department of the Interior review that culminated in the Barry opinion rejecting the Wilbur interpretation.

The landowners seek to draw favorable implications from the fact that Congress took no action with respect to

⁷⁴ Acreage Limitation (Reclamation Law) Review: Hearings on S. 1425, S. 2541, and S. 3448, Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 85th Cong., 2d Sess. (1958).

private lands in the Imperial Valley when in 1946 it amended Section 9 of the Project Act dealing with public lands and when it rejected an attempt by the Bureau of Reclamation to extend its control over operation of the project works. However, there is no evidence that the acreage limitation question was brought to the attention of Congress during its consideration of these other matters. For example, the 1946 amendment to Section 9 of the Project Act merely extended the veterans' preference in that Section to veterans of World War II and to those who had served in the Coast Guard. 75 Furthermore, in contrast with the Imperial Irrigation District's dispute with the Bureau of Reclamation that the landowners refer to, Congress took no action when the present dispute over application of the acreage limitations arose after the 1964 Barry opinion, so it could be argued, in terms of the landowners' frame of analysis, that Congress acquiesced in this new interpretation of the reclamation laws. We draw neither conclusion from Congressional inactivity. The point is that in the absence of specific indications that Congress actually considered this problem, the incidents relied upon by the landowners cannot support the finding of Congressional ratification that the landowners desire

This conclusion is buttressed by consideration of the landowners final version of this argument, i.e., that with all this information on the situation in the Imperial Valley, the repeated appropriations from 1936 to 1950 for continuing construction on the All-American Canal amounts to a Congressional ratification of the administrative construction as it is viewed by the landowners. However, the references relied upon by the landowners to show Congressional knowledge and consideration of the Wilbur letter do not date back earlier than 1944. There is no showing of Congressional knowledge and consideration, one

⁷⁶ See 1946 U.S. Code Congressional Service pp. 1080-1081.

way or the other, prior to that year. In addition, in 1944 the Harper opinion cast considerable doubt over the validity of the Wilbur interpretation even if it did not specifically reject it in the case of the Imperial Valley, and Congress may have been aware of the later Department of the Interior opinion. Furthermore, by 1944 the Imperial Valley had already been receiving all of its irrigation water through the All-American Canal for about two years. Presented with this situation and the Harper opinion, the following appropriations may just as well be considered solely as Congressional ratification of the application of acreage limitations in the Coachella Valley. As before, the record here is too sparse and ambiguous to justify a conclusion that Congress approved of the Wilbur construction of the Project Act and the reclamation laws.

The landowners claim that it would be unfair to enforce the excess lands provision of Section 46 of the Omnibus Adjustment Act of 1926 because of individual landowner reliance on the Wilbur letter and the past non-enforcement of the 160-acre limitation. The landowners raise claims here based on broad generalizations that cannot apply under the facts of the case. There are many holdings of land in excess of the 160-acre limitation in the Imperial Irrigation District before the Wilbur letter was issued and these holdings could not have been acquired in reliance upon the assurances contained in that letter. In any event, the questions of reliance and estoppel presented by the landowners' argument here are not germane to this lawsuit. In operation, Section 46 requires compensation to excess land holders for the value of their property and their improvements to their property. It only excludes the increase in the value of the land attributable to the federal project. United States v. Tulare Lake Canal Co., supra, 535 F.2d at 1113 n. 74, 1144.76 Furthermore, assuming that any individual

⁷⁶ The District claims that the construction of the All-American Canal did not change the value of private lands in the District

landowner can make out a claim to greater compensation based on estoppel or some other theory, compensation will be available, for if the enforcement of the conditions of Section 46 "impairs any compensable property rights, then recourse for just compensation is open in the courts." Ivanhoe Irrigation District v. McCracken, supra, 357 U.S. at 291, 78 S.Ct. at 1183. Cf. United States v. Union Oil Company of California, 549 F.2d 1271, 1281 (9th Cir. 1977). The point is that the possibility that such compensation may be mandated cannot defeat compliance with the conditions of the reclamation laws.

In a variation on the reliance on administrative practice argument, the District relies on its contract with the United States. Article 30 of the contract paraphrases Section 14 of the Project Act. The Coachella Valley contract contains an identical section but, in addition, contains additional clauses dealing with the divestiture of excess lands. The District argues that these additional clauses would be superfluous if the section based on Section 14 of the Project Act was sufficient to incorporate Section 46. However, it should be remembered that after the Barry opinion was issued in 1964 the District refused to agree to a supplemental contract with the United States that would govern the administration of the divestiture provisions of Section 46. From the discussion in Part IV, supra, it is clear that the general incorporation of the reclamation law in Section 14 of the Project Act that is carried over into

because the Canal only provided an alternate means of conveying irrigation water already supplied by non-federal enterprise. We doubt that this is the case. The location of the Canal entirely within American territory, a project the District was unable to undertake on its own, is, in itself, a significant benefit. The appraisal process takes into account the value, or lack thereof, of the federal project to the private lands. However, Section 46 would still apply because it was the intent of Congress to make small family farms the recipients of water delivered by federal reclamation projects.

the contract is sufficient to mandate application of Section 46.77

VII. Conclusion.

In No. 71-2124, the district court's order denying leave to intervene is reversed, the protective notice of appeal is validated, and the judgment is reversed. In Nos. 73-1333 and 73-1388, the judgment is vacated and the case is remanded with instructions to dismiss the complaint because of lack of standing.

Appendix to follow

[The appendix to the court's opinion is reproduced as Appendix B herein infra at 62a.]

⁷⁷ For the reasons set out in Part IV of this opinion, the District's argument that separation of the contract provisions for delivery of water and for construction, operation, and maintenance of the Canal precludes application of Section 46 must also be rejected.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

IMPERIAL IRRIGATION DISTRICT, a corporation,

Appellee,

JOHN M. BRYANT, et al.,

Appellees,

STATE OF CALIFORNIA.

Appellee.

BEN YELLEN, et al.,

Appellants.

No. 71-2124 [August 6, 1973]

Before: HASTIE,* MERRILL and ELY, Circuit Judges.

ORDER ALLOWING INTERVENTION

It appearing that the decision of the district court in this case, 322 F.Supp. 11 (S.D.Cal.1971) and a subsequent decision of another judge of the same court in Yellen v. Hickel, 335 F.Supp. 201 (S.D.Cal.1972) disclose conflicting rulings on questions of law that may significantly affect

^{*} Honorable William H. Hastie, Senior United States Circuit Judge, Third Circuit, sitting by designation.

the course of economic development of the Imperial Valley of California; and it also appearing that an appeal to this court in Yellen v. Hickel is pending at our Nos. 73-1333 and 73-1388, but that the election of the United States, the unsuccessful plaintiff, not to take an appeal in the present case precludes appellate review unless the interested Imperial Valley landowners who are before us seeking to intervene are allowed to do so and to perfect and prosecute a protective appeal that they have noticed; and it further appearing that the order of the district court denying intervention, from which the interested landowners are now appealing, was made before the district court decision in Yellen v. Hickel and, therefore, that the district court could not anticipate the decisional conflict in the light of which this court now must act; and because it is the responsibility of this court to avoid, where feasible, the confusion and uncertainty that would result if two conflicting final decisions on legal issues of public and private importance should both be in force in this circuit.

Now, therefore, it is ORDERED that the order of the district court denying the petition of the appellants to intervene in this cause is reversed, and intervention as prayed is allowed nunc pro tunc and the protective appeal noticed by the intervenors is validated.

It is further ORDERED that the Clerk shall in due course calendar this appeal and the appeal in Yellen v. Hickel for hearing on the same day before the same panel of this court.

The parties to this appeal shall be privileged to supplement their briefs and the record heretofore filed herein.

APPENDIX C

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

IMPERIAL IRRIGATION DISTRICT, a corporation, Defendant-Appellee,

John M. Bryant et al., Defendants-Appellees,

State of California, Defendant-Appellee, Ben Yellen et al., Appellants.

Ben YELLEN et al., Plaintiffs-Appellees,

V

Cecil D. ANDRUS et al., Defendants-Appellants,

Ben YELLEN et al., Plaintiffs-Appellees,

v.

Cecil D. ANDRUS et al., Defendants-Appellants,

W. L. Jacobs et al., Defendants-Appellants. Nos. 71-2124, 73-1333 and 73-1388.

April 23, 1979.

Appeals from the United States District Court for the Southern District of California.

Before BROWNING and KOELSCH, Circuit Judges, and WOLLENBERG*, District Judge.

WOLLENBERG, District Judge:

I. Rehearing and Rehearing In Banc

In petitioning for rehearing and rehearing in banc of the decision of this Court in No. 71-2124, filed August 18, 1977, appellees Imperial Irrigation District and John M. Bryant, et al., argue that standing of the Yellen group, intervenors-appellants herein, is predicated on the erroneous assumption that if Section 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. 423e, were to be enforced,

^{*} The Honorable Albert C. Wollenberg, Senior United States District Judge for the Northern District of California, sitting by designation.

¹ In pertinent part, Section 46 provides that:

No water shall be delivered upon the completion of any new project or new division of a project initiated after May 25, 1926, until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States ... and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. . . . Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior.

land in the Imperial Irrigation District would become available at below-market prices. Said appellees further argue that the decision is internally inconsistent and is contrary to this Court's decisions in *Bowker v. Morton*, 541 F.2d 1347 (9th Cir. 1976), and *Turner v. Kings River Conservation District*, 360 F.2d 184 (9th Cir. 1966).

Appellees take the position that even if the Court orders enforcement of Section 46, land in the District would not become available at below-market prices, and thus the relief would not end the harm of which appellants complain as required for standing by Bowker v. Morton, 541 F.2d at 1350. Enforcement of Section 46 would require that landowners execute recordable contracts for the sale of land in excess of 160 acres per private owner in order to receive irrigation water on the 160 acres. Sales of land to meet the 160-acre limitation must by statute be at lower than market prices. Appellees state that Section 46 does not apply after March 1, 1978, because one-half of the construction charges for the irrigation project will have been paid. We held in United States v. Tulare Lake Canal Co., 535 F.2d 1093 (9th Cir. 1977), cert. denied, 429 U.S. 1121, 97 S.Ct. 1156, 51 L.Ed.2d 571 (1977), that the statement in Section 46 that in the initial breakup of excess lands the Secretary of the Interior must fix the sale price "on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works" applies regardless of the fact that construction charges for the irrigation project have been repaid. This decision expressly applies to all federal reclamation projects subject to Section 46. Id. at 1118. As we recognized in our opinion of August 18, 1977, 559 F.2d at 514, 522, the irrigation works added substantial value to the land for agricultural purposes, and thus it is only reasonable to infer that sales under the Tulare formula will be at below-market prices. Indications at trial by the Solicitor of the Department of the Interior that the Department has in the past been willing to recommend that

excess lands be sold at current market values does not override the fact that the Secretary of the Interior is bound by law to discount the value added by the construction project in fixing sale prices for excess lands. That there was pre-project irrigation does not excuse this requirement. United States v. Tulare Lake Canal Co., 535 F.2d at 1112-14.

The decision of August 18, 1977, in this action is neither inconsistent with Bowker nor is it internally inconsistent. The Court in Bowker set forth a three-prong test for standing which we applied in the case at hand; the test requires "that the plaintiffs must have alleged (a) a particularized injury (b) concretely and demonstrably resulting from defendants' action (c) which injury will be redressed by the remedy sought." 541 F.2d at 1349. The Court denied standing in Bowker to plaintiffs who sought enforcement of the acreage limitation by sale of excess lands at "reasonable" prices. Intervenors in the acreage case presently before us do not seek what this Court cannot provide, namely sole of land at any specified price defined by what price was "reasonable." Intervenors in the acreage case merely seek enforcement of the requirement in Section 46 that sales be at prices below current market value. The Court can issue a decree enforcing that code section that will ensure that any sales arising out of the acreage case are at below-market prices. While it is true that landowners cannot be forced to sell their lands, it is only reasonable to assume that some land will become available for sale rather than being put into other than agricultural uses.

For the same reason, our decision is not internally inconsistent. Although the parties who claim standing to bring the issues before the Court are essentially the same in both the residency and the acreage cases, as we stated in our opinion, 559 F.2d at 522, relief from the harm in the residency case is much more speculative than it is in the acreage case. In the residency case, plaintiffs seek to purchase land at prices they could afford, whereas in the

acreage case this same group alleges a desire to purchase land at below current market prices. The Court's order in the residency case cannot ensure sale of land at affordable prices, but in the acreage case it can enforce the pricing requirement of Section 46. Furthermore, in the residency case there is the alternative present for third-party land-owners of moving into the District which is not present in the acreage case.

Another reason our decision is not inconsistent with Bowker is that plaintiffs in Bowker did not even allege a desire to purchase land should it become available for sale, whereas intervenors in the acreage case did allege such a desire.2 The appellate court in Bowker stated that one reason it denied standing in that case was that plaintiffs did not allege that they sought to purchase land. 541 F.2d at 1350. Plaintiffs in Bowker also were not shown to meet the eligibility requirement to purchase land made available for sale as they were not residents of the district in which they sought to have the statute enforced. The gravamen of the complaint of the Bowker plaintiffs was that they were subject to a competitive disadvantage as farmers in a federally irrigated area in which the acreage limitation was in effect because the limitation was not being enforced in a state service area. Similar infirmities in the group of plaintiffs distinguish Turner v. Kings River Conservation District, 360 F.2d 184 (9th Cir. 1966), from the case at hand in that plaintiffs denied standing in that case did not allege a desire to purchase land in the irrigation district upstream as to which they sought to have the acreage limitation enforced.

² The Amendment to Complaint in which the *Bowker* plaintiffs alleged a desire to purchase land in the area in question was not considered filed by the district judge because it had been filed without leave of court. Order filed August 2, 1973, *Bowker* v. *Morton*, No. C-70-1274. The First Amended Complaint filed by order of court thereafter on February 8, 1974, did not allege a desire to purchase land.

Finally, although the Court in Bowker did indicate that in that case a court order discontinuing delivery of water to excess lands would not insure that the remedy sought of making land available for sale would result, the record in this case supports a different conclusion. This is not a case where "the solution to [intervenors'] problem depends upon decisions and actions by third parties who are not before the court and who could not properly be the subject of a decree directing the result sought by [intervenors]." Bowker v. Morton, 541 F.2d at 1350 (citation omitted). Both the District and the landowners are parties to the action, the latter having intervened as defendants below. Thus, both will be bound by a decree holding Section 46 applicable to excess lands and ordering a cutoff of water to any such lands where recordable contracts have not been executed. It is also clear from the record in this case that land in the Imperial Valley has long been devoted to agricultural use, that the entire economy of the Valley is based on agriculture and agricultural support industries, that the particular 233,000 acres involved constitutes some of the finest agricultural land in the world, and that federal irrigation facilities provide the only assured source of water in the Valley. Thus, "it [is] highly improbable that all of the large holdings of irrigable land would be withdrawn from agricultural use in order to avoid the requirements of Section 46." 559 F.2d at 522. Compare id. with Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 43, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976).

The petition for rehearing of appellee State of California on the ground that the Court's opinion does not place a proper emphasis on the Wilbur letter and questions of fairness stemming therefrom is also denied. Appellees raise nothing that was not thoroughly considered in reaching the Court's decision.

Judges Browning and Koelsch have voted to reject the suggestions for a rehearing en banc, and Judge Wollenberg has recommended rejection of the suggestion for rehearing en banc. The full Court has been advised of the suggestions for en banc rehearing, and no judge of the Court has requested a vote on the suggestions. Fed. R.App.P. 35(b).

Accordingly, the suggestions for a hearing en banc are rejected.

II. Attorneys' Fees

Appellants move for attorneys' fees for the appeal of action No. 71-2124 in which they were successful in reversing the district court decision. As a consequence of the appeal, an estimated 233,000 acres of agricultural land will become available for purchase at below-market prices in parcels of 160 acres or less. Appellants advance two theories to support their claim for attorneys' fees: that the Civil Rights Attorneys' Fees Award Act of 1976 provides for counsel fees in cases brought under 42 U.S.C. § 1983 and that counsel fees may be awarded where, as here, a suit confers a substantial benefit to a class.

The argument that the Civil Rights Attorneys' Fees Award Act of 1976 entitles counsel to fees in this action is specious. That Act provides for the award of counsel fees in cases brought to enforce the civil rights laws, including 42 U.S.C. § 1983 which creates a cause of action for a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Relying on the language of section 1983, appellants argue that the Civil Rights Attorneys' Fees Award Act of 1976 should be interpreted broadly to allow fees in cases which secure rights guaranteed by federal laws as well as those actions based on the federal Constitution. Citing Blue v. Craig. 505 F.2d 830 (4th Cir. 1974). There is no need to reach this question, nor need we decide whether this lawsuit's vindication of the statutory rights of appellants was sufficient to make out a claim under 42 U.S.C. § 1983. This action was not brought pursuant to that code section, and therefore there is no statutory basis for the award of fees.

The theory that attorney's fees should be awarded because this appeal will confer a substantial benefit on an ascertainable class has more promise for appellants, but on analysis also fails to support an award of fees in this case.

The "substantial benefits" exception to the traditional rule disfavoring awards shifting legal fees is well recognized. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), and survives the rejection in Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) of the more sweeping "private attorney general" theory of counsel fee recovery. See id. at 257, 264-65 n.39, 95 S.Ct. 1612. The justification for this exception is that identifiable persons who benefit substantially from action of the party seeking fees should share the costs. "To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." Mills, 396 U.S. at 392, 90 S.Ct. at 625. See also Hall v. Cole, 412 U.S. 1. 5-6, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). However, because the beneficiaries frequently are not parties or members of a certified class before the court, this exception is subject to an important limitation that bars an award in this case. The limitation is that there must be before the court a party against whom the court can assess fees who stands in such a relationship to the benefited class that the award will "operate to spread the costs proportionately" and "with some exactitude" among the identifiable beneficiaries of the fee-seeker's success. Mills, 396 U.S. at

³ Appellants do not seek fees on the "common fund" theory, from which the substantial benefit theory derives. No basis for such a claim appears, as no "identifiable fund" has been "create[d], discover[ed], increase[d], or preserve[d]" by appellants' successful appeal. *Vincent* v. *Hughes Air West*, *Inc.*, 557 F.2d 759, 768-69 (9th Cir. 1977).

394, 90 S.Ct. at 626; Alyeska, 421 U.S. at 265 n.39, 95 S.Ct. 1612. Only when this is true will attorney's fees be effectively spread among those who stand to gain from the litigation without contributing to it, rather than simply being shifted to the loser.⁴

The two leading Supreme Court cases are illustrative. In Mills, a shareholder prevailed in an action to set aside the merger of his corporation into another because in recommending approval of the merger the directors of his corporation had failed to disclose that they were controlled by the acquiring company. The Court shifted the shareholder's attorney's fees to the corporation because the suit conferred a substantial benefit on all shareholders and the corporation itself, and because "[T]he court's jurisdiction over the corporation as the nominal defendant maskes it possible to assess fees against all of the shareholders through an award against the corporation." 396 U.S. at 395, 90 S.Ct. at 627. All shareholders benefited from vindication of the securities fraud rules and, by requiring the payment of the counsel fees from the corporate treasury, all would be taxed their proportionate share of the costs through lowered dividends. The reasoning in Hall v. Cole is similar: the plaintiff-union member vindicated rights of free speech in union affairs and thus "rendered a substantial service to his union as an institution and to all of its members" (412 U.S. at 8, 93 S.Ct. at 1948); shifting plaintiff's counsel fees to the union would effectively charge all of the members with the cost of achieving the common benefit by taking a share of each member's dues.

As the Mills Court put it: "[t]o award attorneys' fees in such a suit to a [successful] plaintiff . . . is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit." Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396-97, 90 S.Ct. 616, 628, 24 L.Ed.2d 593 (1970). See also Hall v. Cole, 412 U.S. 1, 6, 93 S.Ct. 1943, 36 L.Ed.2d 102 (1973).

Appellants urge, without supporting analysis, that their case is analogous to *Mills* and *Hall* v. *Cole*. If this is so, it must be because their success benefited a distinct class (those who will purchase excess irrigated land as a result of enforcement of the acreage limitation⁵), and because a suitable party is present (the District) against whom counsel fees can be assessed. Appellants satisfy the first requirement but not the second.

The class of beneficiaries to which appellants point is suitably "small in number and easily identifiable" (Alyes-ka, 421 U.S. at 264 n.39, 95 S.Ct. at 1625) to permit recovery under the substantial benefit theory. It is not determinative that individual members of the class will not be identifiable unless and until excess land is sold

Moreover, members of the beneficiary class can be readily identified by their land purchases.

b Appellants do not describe the precise nature of the benefits this class will reap, although the primary benefit—the chance to buy land below market price—is evident. If the benefits are pecuniary only, the substantial benefits theory may be unavailable. See Vincent v. Hughes Air West, Inc., 557 F.2d 759, 768-69 & n.7 (9th Cir. 1977). But see Mills v. Electric Auto-Life Co., 396 U.S. 275, 394 & n.19, 93 S.Ct. 1943, 36 L.Ed.2d 102 (1970) (approving cases applying theory to pecuniary benefits). We assume without deciding that appellants' success in this case will produce non-pecuniary as well as pecuniary benefits, and that the substantial benefits theory is available where the benefits are mixed.

⁶ Appellants estimate that, as a result of their appeal, 233,000 acres of excess land will be freed for sale. If those lands are purchased in parcels of the maximum size (160 acres), approximately 1,450 parcels would be available. Smaller parcels would increase the number of beneficiaries in the class, but there can be little doubt the number would remain suitably small. Cf. Burroughs v. Bd. of Trustees, 542 F.2d 1128, 1132 (9th Cir. 1976) (no basis for determining size of the beneficiary class); Brennan v. United Steelworkers of America, 554 F.2d 586, 606 (3d Cir. 1977) (classes of 1,400,000, of 8,987, of 85,000, and of 250,000 are small enough).

below market value as a consequence of appellants' lawsuit. Ready identifiability is required to insure clear, concrete evidence that the fee-seeker's efforts produced actual benefits to others, and that fees are assessed only against beneficiaries—those who would be unjustly enriched by not sharing in the cost of producing the benefit—and not against persons whose positions are not substantially bettered because of the victorious lawsuit. If clear identification of the beneficiaries will come about reasonably soon after conclusion of the lawsuit, the substantial benefit theory may be available to authorize a fee award, although fixing and collecting the award would have to await identification of the beneficiaries. Cf. Van Gembert v. Boeing Co., 573 F.2d 733, 736-37 (2d Cir. 1978).

But appellants fail to satisfy the second requirement: they have made no showing that the District is a proper party to be charged with appellants' attorneys' fees under the substantial benefit theory. The District is not in the same position as the corporation in Mills or the union in Hall v. Cole. In those cases the beneficiaries had pre-existing relationships with the corporation or union, and had contributed funds to the treasury from which the fee award was to come.7 Thus, because the result secured in Mills and Hall v. Cole was, by its nature, of benefit to each shareholder or union member, the court had "reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting" through charging fees to the treasury to which each shareholder or union member had contributed in common. Alveska, 421 U.S. at 265 n.39. 95 S.Ct. at 1625 n.39. Cf. Skehan v. Bd. of Trustees of Bloomsburg State College, 538 F.2d 53, 56 (3d Cir. 1976) (en banc). In this case, the result achieved is not beneficial to all landowners within the District. Those who own ex-

⁷ See Note, Fee Awards and the Eleventh Amendment, 88 Harv.L.Rev. 1875, 1883 (1975).

cess lands will be required to sell the excess at belowmarket prices, or will no longer receive water for irrigating those lands. If appellants' attorneys' fees were drawn from the District's general revenues, there would be no congruence between the funds disbursed as the fee award and the funds taken in from the beneficiary class in whose name that award is made.

Appellants suggest no alternative method of using District revenues as a vehicle to procure fees from the as-yet-unidentified beneficiaries. Their motion is to charge the District now for their fees. If an alternative is possible, appellants have not advanced it, and the District has had no opportunity to respond. There is no basis before us for assessing attorneys' fees against the District.

Appellants have not advanced this surcharge possibility. We need not pass upon it *sua sponte* and we decline to do so in light of the substantial questions it raises.

^{*} It might be suggested that the District could use its powers to levy assessments against land with the District (see Cal. Water Code §§ 25500-26500) or to collect charges for water service to District landowners (id. §§ 22280-22283) to pass fee costs on to the beneficiaries. We do not know whether the District has the power under state law to tax such supplemental amounts against a distinct class of landowners. We do not know if it would do so (assuming it has the power) absent a court order. We do not know if an order requiring such surcharges would comport with principles of comity or with the Eleventh Amendment. Moreover, we have found no case holding attorney's fees assessable against a governmental body, as opposed to a union, corporation, or similar private body, on a pure substantial benefits rationale. See Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 Harv.L.Rev. 849, 897, 920-21 (1975). See also Note, Reimbursement for Attorneys' Fees from the Beneficiaries of Representative Litigation, 58 Minn.L.Rev. 933, 944-45 (1974).

III. Costs

Appellants who were successful on appeal in No. 71-2124 have submitted a bill of costs in timely fashion pursuant to Federal Rule of Appellate Procedure 39(c). Appellants in Nos. 73-1333 and 73-1388, who were successful on appeal of the issues raised in those cases, did not submit a timely cost bill because they believed that these three cases had been consolidated for appeal and that therefore under Federal Rule of Appellate Procedure 39(a), a split decision had been rendered, and no party was entitled to costs because this Court did not order that costs be allowed.

Federal Rule of Appellate Procedure 39(a) reads in relevant part that "if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court." The cases giving rise to this appeal were tried separately below, and separate judgments were rendered. This Court's order of August 6, 1973, in No. 71-2124, provided that the issues arising out of these cases would be considered together on appeal, but it did not formally consolidate the cases. Therefore, the parties should be allowed costs in the case in which they prevailed. It has long been recognized that prevailing parties may be awarded costs on appeal and that such costs may be assessed against the states. Fairmont Creamery Co. v. Minnesota, 275 U.S. 70, 48 S.Ct. 97, 72 L.Ed. 168 (1927).

The Court's opinion of August 18, 1977, in *United States* v. *Imperial Irrigation District*, 559 F.2d 509 (9th Cir. 1977), should be modified to substitute "considered" for that of "consolidated" in the last sentence of the second complete paragraph on page 520. Because that sentence mislead them, appellants in Nos. 73-1333 and 73-1388 are granted permission to file their bill of costs as received by this Court on September 8, 1977.

ACCORDINGLY, IT IS HEREBY ORDERED that this Court's opinion of August 18, 1977, in United States

v. Imperial Irrigation District, 559 F.2d at 520, is modified to substitute "considered" for that of "consolidated" in the last sentence of the second complete paragraph.

IT IS FURTHER ORDERED that the bill of costs heretofore lodged on behalf of appellants W.L. Jacobs, et al., in Nos. 73-1333 and 73-1388, may be filed by the Clerk and that such filing shall be deemed timely.

IT IS FURTHER ORDERED that appellants in No. 71-2124 be awarded costs in the amount of \$3,218.25.

IT IS FURTHER ORDERED that appellants in Nos. 73-1333 and 73-1388 be awarded costs in the amount of \$3,783.16

APPENDIX D

United States District Court, S. D. California.

UNITED STATES of America, Plaintiff,

v.

IMPERIAL IRRIGATION DISTRICT,

a corporation, Defendant,
John M. Bryant, Robert C. Brown, Theodore B. Shank,
Harold A. Brockman, Clara Marie Gutierrez, Charles
E. Nilson, Kakoo D. Singh, Stephen H. Elmore and
John Kubler, Jr., Landowner Defendants, both
individually and on behalf of members of a class, to
wit, all persons owning more than 160 acres of
irrigable land within the Imperial Valley in California.
State of California, Intervening
Defendant,
No. 67-7.

Jan. 5, 1971.

MEMORANDUM OPINION

TURRENTINE, District Judge.

I. JURISDICTION AND NATURE OF THE CONTROVERSY

This is a civil action brought by the United States. This court has jurisdiction under Title 28, § 1345 of the United States Code. An actual controversy within the jurisdiction of this court exists as to whether the land limitation provisions of reclamation law (hereinafter "acreage limitation" or "160-acre limitation") have any application to privately owned lands lying within the boundaries of said defendant Imperial Irrigation District (hereinafter "District").

The parties to this controversy are plaintiff United States of America, defendant District, landowner defendants John M. Bryant, Robert C. Brown, Theodore B. Shank, Harold A. Brockman, Clara Marie Gutierrez, Charles E. Nilson, Kakoo D. Singh, Stephen H. Elmore and John Kubler, Jr., and each of them, both individually and on behalf of members of a class, to wit, all persons owning more than 160 acres of irrigable land within the District (hereinafter collectively, "landowner defendants") and intervening defendant State of California (hereinafter "California"). Heretofore, by orders duly entered, California and the landowner defendants were granted leave to intervene herein, the latter pursuant to Rule 23(b) (2), Federal Rules of Civil Procedure as representatives of a class consisting of some 800 persons, each of whom own irrigable lands in excess of 160 acres. The aggregate holdings of the members of the class were approximately 233,000 acres as of September 3, 1965.

Plaintiff contends that the 160-acre limitation applies to privately owned lands within the District; and all of the defendants contend in all respects to the contrary.

There is no controversy between plaintiff and the State of California over the application of the excess land laws to the state lands in its Imperial Waterfowl Management Area. The United States, the defendant District and private landowner defendants agree with the State of California that those state lands are not subject to the excess land laws.

This opinion incorporates the court's findings of fact and conclusions of law pursuant to Rule 52, Federal Rules of Civil Procedure.

II. HISTORICAL BACKGROUND

The Imperial Irrigation District consists of lands in the Imperial Valley in California. Due to the below-sea-level topography of the Imperial Valley area, it was recognized

as early as the middle of the 19th century that irrigation by means of diversion and gravity flow from the Colorado River was feasible. In comparatively recent geologic time. the Gulf of California extended inland to the northwest. Its upper limits reached northward of Indio. Through the years, the heavily silt-laden Colorado River deposited sediment and built up a low, flat deltaic ridge entirely across the ancient gulf, cutting off the upper portion from its connection with the ocean. The resulting basin was then an inland sea with a surface area of nearly 2.000 square miles. The greatest depth of this sea was about 320 feet. Deprived of its connection with the Gulf of California, the severed sea dried up, and a portion of the bed which it occupied is now known as the Salton Basin. The greater area around and including this basin is known in its northern part as the Coachella Valley and in its southern part as the Imperial Valley.

In its natural condition, the entire region was an unproductive desert. The annual rainfall averages from two to three inches. The Colorado River and the Colorado River Delta east and south of the Imperial Valley are slightly above sea level. From the delta, the land slopes gradually north and west toward the center of Imperial Valley, which is almost entirely below sea level.

During occasional flooding of the Colorado River, the overflow waters would flow down the slopes of the delta northward into the bottom of the great depression and the Salton Basin. These floodwaters would concentrate more or less in depressions and channels leading from the delta region into what is now known as Salton Sea. These channels, or depressions, form natural canals for diversion of the Colorado River waters into Imperial Valley.

The initial appropriations and diversions of water from the Colorado River were made by the California Development Company, a privately owned corporation organized in 1896 and the predecessor in interest of defendant District, which was organized in July of 1911. These appropriations and diversions laid the foundation for the present perfected water rights which have admittedly existed within the boundaries of the District from and after June 25, 1929, the effective date of the Boulder Canyon Project Act.

The first water from the Colorado River was diverted and brought to the Valley in July of 1901. This water, which was diverted about one mile north of the international boundary with Mexico, was carried by the Alamo Canal through Mexican territory and back into the United States at Imperial Valley to avoid the high mesa and sand-hill country north of the international boundary. For most of its 50 mile course in Mexico, this canal made use of an ancient overflow channel known as the Alamo River, which formerly led into the Salton Sea.

The Alamo Canal, from its point of reentry into the United States, as well as the lateral canals through which water diverted from the river was ultimately distributed to land in the Valley, were owned by seven mutual water companies which were organized by the California Development Company. The stock in such mutual water companies was ultimately acquired by the individual landowners to whose land the water was supplied.

By 1903, through the distributive facilities constructed by the local mutual water companies, approximately 25,000 acres of valley lands were in irrigated cultivation, all as a result of diversions from the River. By the following winter, the irrigated acreage was increased to 100,000. 181,191 acres were irrigated by 1910, 308,009 in 1916, 413,440 in 1919, and 424,145 in 1929, the year when the Boulder Canyon Project Act took effect.

In 1905, the Colorado River broke through its banks, which had over the years been built up above the surrounding terrain, and completely changed its course, sending a flood of water through the Alamo Canal and over the broad

flat area of Imperial Valley. As a consequence, for many months the entire flow of the River passed through the washed-out heading, through the Alamo Canal and into Imperial Valley, creating Salton Sea with a surface area of 330,000 acres, and threatening the entire valley with destruction. The surface of the Salton Sea, formerly nearly dry at an elevation of 273 feet below sea level, was raised to 190 feet below sea level. The efforts of the California Development Company to close the breach were unsuccessful. The Southern Pacific Company's tracks being endangered, the Southern Pacific Company advanced funds to the California Development Company to control the River and took controlling interest therein as security. By utilizing its own resources the Southern Pacific Company closed the breach in the west bank of the River and returned the River to its channel. In the Spring of 1916, the Southern Pacific Company foreclosed on the California Development Company's interests and, in June of that year, transferred them to defendant District.

In 1922-1923 District acquired all of the mutual water companies that had been organized by California Development Company. Since that time and until the present, the District has performed the entire function of diverting, transporting and distributing the water supply to farm holdings in Imperial Valley.

On November 24, 1922, the Colorado River Compact, an interstate agreement relating to allocations and rights in the waters of the River, was signed by commissioners representing the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming. It became effective June 25, 1929.

The Colorado River Compact was authorized by an Act of Congress dated August 19, 1921, 42 Stat. 171, and by the Acts of the Legislatures of the participating states. Congress approved it in section 13 of the Boulder Canyon Project Act, 43 U.S.C. § 6171.

The construction of the All-American Canal was authorized as part of the general project authorized by the Boulder Canyon Project Act (hereinafter "Project Act" or "Act") of December 21, 1928, effective June 25, 1929, 45 Stat. 1057, 43 U.S.C. § 617 et seq.

At the time of the taking effect of said Project Act, the District had a distribution and drainage system which was wholly financed, constructed, maintained and operated by local means. The distribution system then, as of June 25, 1929, comprised approximately 1,700 miles of main and lateral canals, providing for the irrigation by waters diverted by it from the Colorado River of approximately 424,000 privately owned acres, computed on a single cropping basis. All of this acreage was, as of June 25, 1929, being irrigated by and with Colorado River water, carried through the Alamo Canal. In 1966, just prior to the bringing of this action, there were approximately 438,000 acres irrigated with water transported through the All-American Canal.

Pursuant to the Project Act, the Government constructed Hoover Dam, at Black Canyon, and incidental works, completing the construction of the dam in 1935. On February 1, 1935, under the direction of the then Secretary of the Interior (hereinafter "Secretary"), Harold L. Ickes, the Government began storing water in Lake Mead, the reservoir created by Hoover Dam, and since that date the Government has continuously operated and maintained Hoover Dam for the purposes specified in the Project Act.

On December 1, 1932, the United States and the District, acting pursuant to the Project Act, entered into a contract providing, *inter alia*, for construction of a main canal connecting Imperial and Coachella Valleys and requiring repayment by the District for the costs of construction. Due to conflicts not material to this case, Coachella Valley landowners were not included in the District, but formed a separate District, the Coachella Valley County

Water District, which executed a similar, though independent, contract with the United States in 1934 calling for construction of water delivery structures and delivery to lands in Coachella Valley.

Pursuant to its 1932 contract with the District, the United States constructed Imperial Dam and the All-American Canal, commencing construction in August, 1934. In 1940, the United States, while retaining the care, operation and maintenance of these facilities, commenced delivering water through the All-American Canal for use within the District. Also pursuant to the contract, the Secretary transferred to the District, on March 1, 1947, the care, operation and maintenance of the main branch of the All-American Canal west of Engineer Station 1098.

Since 1942, the District's entire water supply has been carried through the All-American Canal. Title to the Imperial Dam and the All-American Canal, as well as to Hoover Dam, is in the United States.

On March 4, 1952, the contract between the United States and the District was amended by a supplemental contract. On May 1, 1952, the Secretary transferred to the District the care, operation and maintenance of the works east of Engineer Station 1098.

The All-American Canal System, as provided for in the contract of December 1, 1932, was declared completed by the contract of March 4, 1952, between the United States and the District; repayment of construction charges commenced on March 1, 1955. The District's financial obligation was fixed at approximately \$25,000,000, repayable in forty annual installments, without interest. All such payments to date have been made from net power revenues derived from the sale of electrical energy generated by hydro-electrical facilities of the All-American Canal, costing the District approximately \$15,000,000. The cost of Hoover Dam and powerplant, estimated in 1965 as \$174,732,000, is being repaid with interest at three percent

primarily from power revenues at the dam. One exception to this is that \$25,000,000, of the cost of the dam, which was allocated to flood control, will be carried interest free by the Government until 1987.

III. DEVELOPMENT OF THE CONTROVERSY

The 1932 contract provided, inter alia, for repayment by the District of the cost of the project works. It did not contain any provision requiring that acreage limitation apply to private lands within the District. On February 24, 1933, Secretary of the Interior, Ray Lyman Wilbur, in a letter mailed to the District, ruled that the 160-acre limitation did not apply to privately owned lands within the District.²

The Wilbur ruling was followed for 31 years and gave rise to an administrative practice which held the 160-acre limitation to be inapplicable to private land-holdings within the District and which endured for the same period and down to the rendition of Solicitor Frank J. Berry's opinion of December 31, 1964.³ In that opinion, the Solicitor concluded that Secretary Wilbur's 1933 ruling was erroneous and that the Boulder Canyon Project Act by its plain terms incorporates those provisions of reclamation law which impose acreage limitation on lands served from federal reclamation projects, including the privately owned lands within the District.⁴

² The full text of the letter is published in 71 Decisions of the Department of the Interior 496, App. E at 529.

³ 71 Decisions of the Department of the Interior 496.

⁴ The study leading up to this opinion was prompted by a letter dated August 7, 1961, from Senator Clinton P. Anderson, Chairman of the Committee on Interior and Insular Affairs, to Secretary Stewart Udall. In the letter, Senator Anderson advised the Secretary that he had received complaints from Southern California that the acreage limitation provisions of reclamation law were not being enforced in the Coachella and Imperial Valleys.

Subsequent to this ruling, the Department for several years attempted to negotiate a new contract with the District which would have incorporated acreage limitation. The failure of these negotiations resulted in this action for declaratory relief.

IV. THE BASIC ISSUE

The question of whether the 160-acre limitation has any application to privately owned lands within the boundaries of the Imperial Irrigation District depends upon an interpretation of the Project Act. In deciding this case, defendants urge the court to limit its inquiry to a judicial review of the 1933 Wilbur ruling. They contend that because of the long-standing administrative practice and the reliance thereon by landowner-defendants in the District. Wilbur's interpretation should be upheld if there is any reasonable basis for his decision, citing Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616, reh. den. 380 U.S. 989, 85 S.Ct. 1325, 14 L.Ed.2d 283 (1965). The court declines to follow this course and believes that this statement of the Tallman rule should not be controlling in this case for the following reasons.5 In Tallman, the suit was brought by an unsuccessful applicant for an oil and gas lease in the Kenai National Moose Range in Alaska. For many years, the Secretary of the Interior had interpreted Executive Order 8979 and Public Land Order 487, which withdrew certain lands from settlement and commercial exploitation. as not prohibiting oil and gas leases because they were not "dispositions" as that term is found in the Executive Order 8979. The first applicants received the particular lease in question; the unsuccessful applicant asserted that these regulations had closed the lands to such leases and that his lease should be issued because the prior applicants had

⁵ There is of course no quarrel with the principle that in problems of statutory construction great deference is given to the administrative interpretation. See Udall v. Tallman, *supra*, 380 U.S. at p. 16, 85 S.Ct. 792 and cases cited therein.

applied when the lands were closed under the terms of these regulations. The court held that the Secretary's established interpretation was reasonable and hence entitled to controlling weight. The court observed that great deference is given to administrative interpretation of statutes, and that:

"When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." (emphasis supplied)

In this case, the basic problem is the meaning of an Act of Congress, not an administrative regulation. In addition, the controversy in Tallman was essentially a competition of private interests for commercial leases, while the decision whether acreage limitation applies under the Project Act involves important considerations of national policy, making this case less appropriate for application of the estoppel-like features of Tallman. If Secretary Wilbur was wrong, then he defeated a Congressional mandate extensively developed in reclamation law. Finally, in Tallman there was a consistent administrative practice, while here the Government has repudiated its former interpretation. The court therefore adopts the goal of determining whether Congress intended in the Project Act to apply acreage limitation to privately owned lands in the Imperial Valley.

This is the first stage of a bifurcated trial. Not included in this phase of the proceedings are the nature and extent of "present perfected rights" of the landowner-defendants, as that term is defined in the Supreme Court decree in Arizona v. California, 376 U.S. 340, 341, 84 S.Ct. 755, 11 L.Ed.2d 757 (1964), or the issue of whether the landowners have any "vested rights" to Colorado River water as against the United States.

⁶ Udall v. Tallman, supra, at p. 16, 85 S.Ct. at p. 801.

V. THE STATUTORY LANGUAGE

Plaintiff contends that the Boulder Canyon Project Act is a reclamation project, and that §§ 1, 4(b), 12 and 14 incorporate general reclamation law, one portion of which is § 46 of the 1926 Omnibus Adjustment Act, 43 U.S.C. § 423e. The latter statute provides that no privately owned lands in excess of 160 acres shall receive water from a new project or new division of a project. Therefore, the acreage limitation must apply to private lands within the District.

Four sections in the Project Act advert to reclamation law. Section 1 provides that construction costs for the canal are to be reimbursable as provided in the reclamation law.

Section 4(b) of the Project Act instructs the Secretary to provide for revenues

"** * by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law * * *"

Section 12 defines reclamation law as the 1902 Reclamation and Acts "amendatory thereof and supplemental thereto."

Section 14, heavily relied on by plaintiff, states:

"This [Act] shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." (emphasis supplied)

Plaintiff asserts that the phrase "construction, operation and management of the works" includes water delivery. Since § 46 of the 1926 Act was the most recent addition to reclamation law at the time the Project Act was passed, it applies to condition delivery of water upon compliance with acreage limitation.

Plaintiff continues by pointing out that §§ 1 and 4(b) of the Project Act require repayment contracts pursuant to reclamation law, and the only means of contracting in 1932 was in accordance with § 46 which required acreage limitation. Thus, the 1932 contract necessarily incorporated an acreage limitation applicable to private lands. Limited to these facts, plaintiff's theory of the statute is disarmingly simple.

Closer examination reveals, however, that the references to reclamation law are carefully qualified, most noticeably by the § 14 language that reclamation law applies "except as otherwise herein provided." And Congress has "otherwise provided" in § 5 that the Secretary may contract for storage and delivery of water.7 Section 5 does not refer to reclamation law or acreage limitation, and this is the section where such reference would be most logical if water delivery is to be conditioned on acreage limitation. Where Congress has employed a term in one place and excluded it in another, it should not be implied in the section where it is excluded. Federal Trade Commission v. Sun Oil Co., 371 U.S. 505, 83 S.Ct. 358, 9 L.Ed.2d 466 (1963). The repayment provisions of § 4(b) are limited to expenses of construction, operation and maintenance: there is no mention in this section of water delivery.

Section 1 of the statute requires reimbursement for the main canal and auxiliary structures under reclamation law, but the clause immediately following this language,

⁷ Section 5 provides in part as follows:

[&]quot;[That] the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof *** upon charges that will, *** in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this [Act] and the payments to the United States under subdivision (b) of Section 4."

"* * * and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy * * *," suggests that the reference to reclamation law merely establishes the principle expressly added, i.e., that the works are not to be paid for by the sale of power. Perhaps most damaging of all to plaintiff's case is the sentence next following:

"Provided, however, That no charge shall be made for water or for the use, storage, or delivery of water for irrigation * * * in the Imperial or Coachella Valleys."

This express exemption from charges for water is one example of the distinction between water delivery and the concepts of reimbursement for project costs and the "construction, operation and maintenance" which is drawn throughout the statute. Other examples are found in Sections 8(a)⁸ and 8(b).⁹ This treatment hardly supports the conclusion that the phrase "construction, operation and maintenance" in § 14 includes water delivery.

In considering plaintiff's incorporation theory, an essential inquiry is whether § 46 is consistent with other terms of the Project Act. A comparison of section 4(b) of the Project Act with § 46 of the Omnibus Adjustment Act

The use of the word "including" seems intended to emphasize the distinctions developed elsewhere.

⁸ Section 8(a) provides in part:

[&]quot;The United States * * * shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation * * * and the storage, diversion, delivery, and use of water * *" (emphasis supplied)

⁹ Section 8(b) provides in part:

[&]quot;Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, *including* the appropriation, delivery, and use of water * * * shall observe * * * the terms of such compact." (emphasis supplied)

reveals differences which point to a displacement of § 46 by the terms of the Project Act. Section 46 contracts are mandatory, while § 4(b) contracts are discretionary. Section 46 deals with both repayment and limitation on water delivery, but § 4(b) does not mention water delivery because § 5 covers that topic. And § 46 contracts must be executed before water delivery, while § 4(b) contracts are to be executed before money is appropriated. From this it appears that the only item in § 46 not expressly provided for in the Project Act is the acreage limitation, an issue of social policy and not mere technical details of contracting. It is unlikely that Congress would relegate an issue as important as acreage limitation for private lands to indirect inclusion. This belief is reinforced by § 9 of the Project Act, which expressly limits public land entries entitled to use project water to 160 acres. The absence of a similar provision for private lands indicates that Congress did not apply acreage limitation to private lands. If the Project Act did incorporate general reclamation law, then § 3 of the 1902 Act10 would apply and the specific direction of § 9 would be unnecessary.

Plaintiff's contention that the 1932 contract between the Government and District was made pursuant to § 46 is unsupported. The contract at Article I recites that it was made pursuant to the 1902 Reclamation Act "and acts amendatory thereof or supplementary thereto *** and particularly pursuant to" the Project Act. Consequently, the contract could simply have been made pursuant to § 5 of the Project Act and § 1 of the 1922 Reclamation Act,

¹⁰ 43 U.S.C. §§ 416, 432, 434. This statute provides that public lands proposed for irrigation under reclamation projects shall be withdrawn and subject to entry under the homestead laws in tracts of not more than 160 acres.

43 U.S.C. § 511.11 The mere existence of § 511 forecloses the argument that § 46 of the 1926 Act provided the only means of contracting for repayment in 1932 and indicates that if Congress had intended § 46 to apply, it would have so stated.

Finally, the Project Act contains a comprehensive set of provisions relating to the rights of prior appropriators of Colorado River Water under the Colorado River Compact. Section 6 of the Project Act names as the second use of the dam and reservoir the "irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact * * *" Under the decree in Arizona v. California construing the Project Act, the application of a specific quantity of water to a defined area of land is an essential element of a perfected right.12 It was held in the court's opinion that Secretary is required to satisfy present perfected rights.13 This duty of the Secretary to supply water to an area where present perfected rights exist is repugnant to the concept that the United States may at the same time shut off water deliveries destined for lands, be they excess or not, entitled to the beneficial use of Colorado River water in the exercise of these rights.

Section 8(a) of the Project Act subjects the United States and all water users to the controlling effect of the Colorado River Compact and constitutes a recognition by

of reclamation law, the Secretary may contract with irrigation districts for repayment of the costs, of construction, operation and maintenance of irrigation works. It also recites that no such contract will be binding on the United States "until the proceedings on the part of the district for the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid."

^{12 376} U.S. 340, 341, 84 S.Ct. 755.

¹³ 373 U.S. 546, at 566, 581, 584, 83 S.Ct. 1468, 10 L.Ed.2d 542.

Congress of the guarantee of present perfected rights found in Article VIII of the Colorado River Compact.

In Section 13 of the Project Act, the Colorado River Compact is approved. There is a second statement that the rights of the United States are controlled by the Compact, and the pre-project water rights are made covenants running with the land for the benefit of water users. These covenants are expressly made available to them for use in any litigation concerning Colorado River water.

The combined effect of §§ 6, 8(a) and 13 of the Project Act is to express Congressional intent that the present perfected rights be protected from interference by any contrary provision of the Project Act or reclamation law. The specific and repeated guarantees found in these sections indicate that any provision such as acreage limitation which would curtail such rights would be detailed in correspondingly exact language. Neither the references to reclamation law contained in §§ 1, 4(b), 12 and 14 of the Project Act, nor any other term thereof demonstrate Congressional intention that acreage limitation apply to privately owned lands in the District.

Two additional propositions urged by plaintiff merit consideration in construing the statutory language. First, it is contended that the Project Act created a federal subsidy; and that therefore the Act must be strictly construed against the grantees (defendants). Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894). However, the Project Act set in motion a great project conferring many and important benefits on all parties involved, including the United States.¹⁴

¹⁴ A report of the Congress which passed the Project Act detailed the benefits to all parties and described the Project as a joint venture by necessity:

[&]quot;Neither Imperial Irrigation District, the Coachella district, nor the United States could afford alone to build a canal from the river. Acting in conjunction, the canal is entirely feasible." Report No. 592, 70th Congress, March 20, 1928 at p. 21.

Among the national interests advanced by the Boulder Canyon Project are included:

- In the inclusion within the District by annexation, pursuant to Article 34 of the contract between the Government and the District dated December 1, 1932, of some 250,000 acres of Government lands.
- 2) Added capacity in the Canal for the servicing of such lands and some 11,000 acres of Indian land.
- 3) Flood control for the purpose of preserving the Laguna Dam and protecting the Yuma Reclamation Project as well as protecting the public lands and private interests in Imperial Valley.
- 4) The control of silt because of the federal government's problem in handling silt in the Yuma Project.
- 5) The need to build a canal on All-American soil to put the United States in a position to bargain with the Mexican Government over the use of the water of the Colorado River.
- 6) It enabled the United States Government to reclaim and put to use large tracts of public and Indian lands of the United States in Coachella Valley. Application of this rule of construction does not advance the search for acreage limitation in the Project Act.

In a related argument, plaintiff also contends that because there is no express exemption from the acreage limitations of reclamation law, the limitation must apply. In this matter, reliance is placed on the following statement in Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 292, 78 S.Ct. 1174, 1184, 2 L.Ed.2d 1313 (1959):

"* * * where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such exemption by express enactment." The guidance afforded by this remark is of doubtful value in this case, because in *Ivanhoe* the legal issue was whether state law precluded applicability of acreage limitation. The case is also factually distinguishable in that one basic ingredient of the Imperial Valley situation, the guarantee of perfected rights by Congress, was wholly lacking in the Ivanhoe context.¹⁵

Finally, it appears that the practice, cited by plaintiff, of enacting express statutory exemptions did not come into vogue until 1938 with the Colorado-Big Thompson Project.¹⁶ This was some ten years after passage of the Boulder Canyon Project Act.

VI. LEGISLATIVE HISTORY

Secure in the belief that the statutory language clearly precludes an incorporation of acreage limitation, the court approaches legislative history with reluctance. The perils inhering in an imaginative recreation of the mind of Congress have been described by Mr. Justice Jackson, who termed the process a "psychoanalysis of Congress." The language sought in the halls of Congress can usually be found in one place or another, and this is particularly true here, for the proceedings in Congress which culminated in the Project Act in 1928 spanned nearly a decade. However,

¹⁵ Indeed, it is doubtful whether the landowners before the court in *Ivanhoe* had any vested rights which Congress could have guaranteed. Certainly the landowners in the Ivanhoe District itself did not. See Ivanhoe Irr. Dist. v. All Parties and Persons, 47 Cal.2d 597, 654, 658, 306 P.2d 824 (Dis. op.); Ivanhoe Irr. Dist. v. McCracken, *supra*, 357 U.S. 275, 285, 78 S.Ct. 1174, 1180: "It is interesting to note that irrigators in this district receive water diverted from the San Joaquin in which they never had nor were able to obtain any water right."

^{16 43} U.S.C. § 386.

¹⁷ United States v. Public Utilities Commission, 345 U.S. 295, 319-320, 73 S.Ct. 706, 97 L.Ed. 1020 (1953).

the disagreement of experts in reclamation law, and the abrupt reversal of Departmental policy require some examination of legislative history for its teachings on Congressional intent.

The first Kettner Bill (H.R. 6044) in 1919 regarding construction of the Boulder Canyon Project did not contain an express provision for acreage limitation. In 1920, a second Kettner Bill (H.R. 11553) was introduced which contained a specific acreage limitation provision. It became apparent that more technical studies were needed before embarking on this ambitious project, and Congress in 1920 authorized a study which resulted in the comprehensive Fall-Davis Report. The Report reaffirmed prior recommendations for an All-American Canal, and, based upon engineering studies of dam sites, recommended the construction of a high dam in Boulder Canyon.

Shortly after publication of the Report, Senator Hiram Johnson and Congressman Phil Swing introduced identical bills in the Senate and House proposing construction of an All-American Canal and a high dam near Boulder Canyon. These bills did not contain an express acreage limitation provision. Due to continuing controversy over dam sites, neither bill was reported out of committee during the 67th Congress.

When the 68th Congress convened, Senator Johnson and Congressman Swing again introduced identical bills, neither providing expressly for acreage limitation, but again neither bill was reported out of committee.

In the 69th Congress, Senator Johnson and Congressman Swing each introduced two more bills. During hearings in 1926 before the House Committee on Irrigation and Reclamation, the question arose whether either of the

¹⁸ Sen.Doc. 142 Problems of the Imperial Valley and Vicinity 67th Cong. 2nd Sess. (1922).

pending Swing Bills (H.R. 6251 and H.R. 9826) would make acreage limitations apply to private lands in the Imperial Valley. Congressman Swing and Dr. Elwood Mead, then Commissioner of the Bureau of Reclamation, both stated unequivocally that nothing in either of the bills would require a landowner to dispose of holdings in excess of 160 acres in order to receive water from the All-American Canal:

"MR. SINNOTT.¹⁹ I would like to ask the doctor is there any provision in the bill sponsored by the Secretary on the farm unit on the lands to be irrigated?

"DR. MEAD. This bill does not go beyond the provisions for three things. One is the dam—the reservoir—and the second is the power plant, and the third is the All-American Canal. It does not deal with irrigation of new lands²⁰ at all.

"THE CHAIRMAN. [Congressman Addison T. Smith] That is reserved for future legislation?

"DR. MEAD. Yes, Sir.

"MR. SINNOTT. The present owner can occupy his present farm unit?

"DR. MEAD. Yes, sir.

"MR. SINNOTT. No matter what that might be?

"DR. MEAD. Yes.

¹⁹ Congressman Sinnott of Oregon.

²⁰ I. e., a "new" project, in the language of the Department. And § 46 of the 1926 Omnibus Adjustment Act, upon which plaintiff relies, only relates to "new" projects or "new divisions" of old projects.

"MR. SINNOTT. What is that now in the Imperial Valley?

"DR. MEAD. Of course, it varies widely. There is not any law. There are a good many large holdings there.

"MR. SINNOTT. There is nothing in this bill requiring the landowner to sell the surplus over a farm unit of 160 acres at a price to be fixed by the Secretary, as is now in the present reclamation law?

"MR. SWING. no, sir." (emphasis supplied)21

After completion of the hearings, Congressman Leatherwood of Oregon prevailed upon the committee to amend its print of H.R. 9826 by including an amendment requiring acreage limitation provisions in all contracts for the delivery of irrigation water.²² H.R. 9826 was reported favorably out of committee, was debated on in the House early in 1927, but was not voted upon.

On the Senate side, one of the Johnson bills, S. 3331, was also favorably reported out of committee, but a vote on this bill was blocked by a filibuster conducted by Senator Ashurst of Arizona. During the floor debates on this bill, Senator Phipps of Colorado offered two amendments which would have incorporated express acreage limitation requirements. Neither of these amendments was adopted.

While this third set of Swing-Johnson proposals did not contain specific acreage limitations provisions, it did refer to reclamation law, making the act a "supplement to the

²¹ Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation, 69th Congress, pp. 32-33 (1926).

²² H.Rept. No. 1657 on H.R. 9826, 69th Cong. 2nd Sess. at pp. 29-30 (1926).

reclamation law, which said reclamation law shall govern the construction, operation, and maintenance of the works ***," the predecessor of § 14 of the Project Act. The advice of Dr. Mead and Congressman Swing in Committee, and the proffered amendments containing express acreage limitation provisions must be read in conjunction with this § 14 language in the bills, language which plaintiff now contends incorporates the acreage limitation features of § 46 of the 1926 Act. The timing of these occurrences is deserving of interest, for this was the Congress which months earlier had passed the Omnibus Adjustment Act of 1926 and would presumably be most sensitive to the possibility of incorporating § 46 acreage limitation into the Project Act by means of the language which was to become § 14.

The 70th Congress saw the introduction of the fourth Swing-Johnson bills, and at the outset one striking development is noted. While all previous Swing-Johnson bills had been identical, now Congressman Swing's bill, H.R. 5773, contained a specific acreage limitation proviso, but Senator Johnson's bill, S. 728, did not contain any such limitation.

H.R. 5773 was reported favorably and was passed by the House after brief debate. In the Senate, Senator Ashurst proposed another bill, S. 1274, which expressly included acreage limitation. The Senate committee refused to take action on this bill and likewise failed to incorporate an amendment by Senator Ashurst to S. 728 which would have added acreage limitation. S. 728 was reported out of committee with a recommendation for passage, but Senate debate on the measure was again bogged down in a filibuster by the Arizona Senator. At the beginning of the second session, the Senate undertook consideration of H.R. 5773 under the floor management of Senator Johnson.

²³ S.Rept. 592 on S. 728, 70th Cong., 1st Sess., March 20, 1928.

Senator Hayden of Arizona had called attention to the discrepancy between the House and Senate versions in the matter of acreage limitation and proposed a corrective amendment. This amendment was not adopted. Senators Ashurst and Hayden on several occasions called attention to their rejected amendments and criticized the Senate bill for its lack of an acreage limitation applicable to private lands.²⁴

The statements of Senators Pmpps, Hayden and Ashurst recur too frequently and are too pointed to be disregarded. While the statements of opponents of a bill may not be authoritative, "they are nevertheless relevant and useful, especially where, as here, the proponents of the bill made no response to the opponents' criticisms." ²⁵

In this session, Sen. Johnson moved to substitute S. 728 for H.R. 5773 so as to retain the enacting clause of H.R. 5773 and the text of S. 728, leaving the potential Act without an express acreage limitation provision. Senator Johnson advised the Senate that H.R. 5773 contained "like purposes and like designs" and that the substitution was offered to "preserve orderly legislative procedure." Unanimous consent to the substitution was obtained.²⁶

This action is puzzling no matter how you read the completed statute with regard to acreage limitation. Plaintiff contends that because there was unanimous consent, with no complaint even from Senators Ashurst and Hayden, the Senate believed that acreage limitation was incorporated by the general references to reclamation law and that there was no real difference. However, the numerous

²⁴ See e. g., 69 Cong.Rec. 9451.

²⁵ Arizona v. California, 373 U.S. 546, 583 n. 85, 83 S.Ct. 1468, 1489, 10 L.Ed.2d 542 (1963).

^{26 70} Cong.Rec. 67 (1928).

amendments proposed and the remarks during debate clearly show that Congress did not understand the two bills to be identical. Why someone on either side of the issue did not point to this significant difference is a question which probably cannot be answered now except by speculation.

To conclude the chronology, the Senate passed this version of the bill, and the House did likewise shortly thereafter. President Coolidge signed it into law on December 21, 1928.

There remains the question of why Congress desired to exempt these lands from acreage limitations when that policy had been a cornerstone of prior reclamation law. As noted in the discussion of the plain language of the statute, Congress enacted legislation recognizing prior rights to appropriation of Colorado River water which had been established by land cultivators in the Imperial Valley. The proceedings before Congress show that it was aware of the water rights held in Imperial Valley and that provisions of §§ 1, 6, 8, and 13 of the Project Act were designed to protect these rights from charges for water delivery and to insure that rights deriving from the Colorado River Compact would be recognized.27 The steps taken to protect these rights were accomplished in recognition of the fact that the All-American Canal Project was not merely an arid lands reclamation project, but was a special purpose program designed for national purposes, including water negotiations with Mexico, as well as for regional agricultural development.

VII. ADMINISTRATIVE PRACTICE

In construing a statute, weight must be given to interpretation placed on the statute by those charged with its

²⁷ See, e. g., Remarks of Senator King in 70 Cong.Rec. 528; Remarks of Senator Johnson 70 Cong.Rec. 233.

administration. Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965). See also Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1964). Respect for administrative interpretation is particularly appropriate when the administrative practice involves a "'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.' Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315, 53 S.Ct. 350, 77 L.Ed. 796 (1933)." Power Reactor Development Co. v. International Union of Electrical Radio and Machine Workers, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924 (1961).

After consultations within the Department, Secretary Wilbur on February 24, 1933, advised the Imperial Irrigation District by letter that the acreage limitation of reclamation law did not apply to private lands in the Imperial Valley. This letter stated in pertinent parts as follows:

"Early in the negotiations connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this canal. Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right. These lands, having already a water right, are entitled to have such vested rights recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas.

In connection with the activities of the Bureau of Reclamation it has been held that the provisions of section 5 of the reclamation act restricting the sale of a right to use water for land in private ownership to not more than 160 acres will not prevent the recognition of a vested water right for a larger area, and protection of the same by allowing the continued flowage of the water covered by the right through the works constructed by the Government. (Opinion of Assistant Attorney General, 34 L.D. 351; Anna M. Wright, 40 L.D. 116). On many projects it has been the practice to recognize vested rights in single ownership in excess of 160 acres and to deliver the water necessary to satisfy such rights through works constructed by and at the expense of the Government. This is true of the Newlands project, the North Platte project, the Umatilla project, and others."

Pursuant to Article 31 of the December 1, 1932, contract, judicial proceedings for the confirmation of the contract were instituted in the California Superior Court for Imperial County, sub nom. Hewes v. All Persons. (Civil No. 15460, unreported, 1933). The United States was not named a party but was kept advised of all steps in those proceedings and furnished with copies of all pleadings and papers filed therein. There was directly raised in the pleadings the question as to whether the 160-acre limitation had application to privately owned lands within the District. At no time did the United States voice opposition to the proposition urged in the litigation that the 160-acre limitation did not apply to landholdings within the District, either by intervening in said action, appearing therein as amicus curiae or otherwise.

The decision in said cause of Hewes v. All Persons upheld the authorization for and the validity of the December, 1932 contract, as written, i. e., as being a contract which, consistently with the knowledge and intent of the parties thereto, contained no clause or provision having the effect of imposing the 160-acre limitation upon private landholdings within the District. The decision expressly held that the acreage limitation had no application to privately owned lands within the District. At all times during the construction of the All-American Canal and thereafter, the United States was aware of the holdings of the Supe-

rior Court. During the years when the All-American Canal was being constructed, no one in the Bureau of Reclamation or Department of the Interior suggested at any time that the acreage limitation was or should be applicable to the Imperial Valley.

In 1941, B. P. King, an attorney in the Bureau of Reclamation was authorized by Commissioner of Reclamation, W. J. Bunks, under instructions of the Secretary of the Interior, Harold L. Ickes, to make a comprehensive study of the excess land law. Pursuant to these directions, a report was filed in the same year entitled "The Excess Land Provision of the Federal Reclamation Law." In the report, Mr. King gave consideration specifically to the All-American Canal. Mr. King concluded that the excess land provisions of federal reclamation law were not applicable to the Imperial Valley.

In 1942, the General Counsel for the Federal Land Banks at Berkeley raised the question as to whether the 160-acre limitation was applicable to privately owned lands within the Imperial Irrigation District, Imperial County, California. The officials of the Federal Land Bank at Berkeley were informed by the Bureau of Reclamation that the limitation did not apply to such lands.

In 1946, the Bureau of Reclamation published its "Landownership Survey on Federal Reclamation Projects." This survey reflected no excess land acreage in the Imperial Valley.

Perhaps the most serious challenge to the administrative policy initiated by the Wilbur letter arose in 1944-1945 in connection with negotiations for a supplemental repayment contract to be entered into between the United States and the Coachella Valley County Water District. Solicitor of the Department Fowler Harper rendered an opinion²⁸ on May 31, 1945, stating that Section 14 of the

 $^{^{\}rm 28}$ 71 Decisions of the Department of the Interior 496 Appendix H at p. 533.

Project Act carried into operation the acreage limitation provisions of reclamation law and that acreage limitation should be incorporated in the Coachella contract. He noted that the Wilbur letter was limited to Imperial Valley, but he criticized it on the basis that it disregarded all other excess-land provisions except section 5 of the 1902 Reclamation Act.

Following approval of the opinion by Secretary Ickes, a supplemental contract was executed on December 27, 1947, which imposed acreage limitations in the Coachella Valley. Compliance was voluntary on the part of the Coachella District, and no litigation on the issue ensued. Whether this acceptance was in recognition of the correctness of the ruling or merely reflective of the fact that there were few excess land holdings is unknown.

The Department was left in the seemingly anomalous position of enforcing acreage limitation in Coachella Valley under the Project Act while allowing excess land holdings in the Imperial Valley. It will be recalled that section 1 of the Project Act prohibits charges for the "use, storage or delivery of water * * in the Imperial or Coachella Valleys." This apparently contradictory state of affairs was called to the attention of Secretary Krug in 1948. In a letter to H. C. Hermann of the Veterans of Foreign Wars, commenting on this situation, the Secretary noted that as a technical matter the Harper opinion applied only to Coachella Valley. He further stated:

"Concerning, however, the substantive questions which relate alike to both districts, we have concluded that inasmuch as the Secretary of the Interior then charged with the administration of law construed the acreage limitation as not being applicable to lands of the Imperial Irrigation District under the facts as he then understood them, and it being clear that the then owners and subsequent purchasers of irrigable lands in the Imperial Irrigation District were entitled to reply upon advice from the Secretary and thus establish an economy in the district consistently with that

advice, they should not now be abruptly advised that the economy of the project is to be changed under a contrary ruling of the present officer charged with the administration of the law.

To the extent, therefore, that the actual fact situation with respect to lands and water rights may be identical in the two districts in question, and to the extent that the advice furnished in the Coachella case would otherwise be applicable in the Imperial case, we feel that we must allow that inconsistency, if such there be, to continue. I think that you will understand the position which the Department must take in this matter in fairness to those who have relied on its action, even though that action might now be subject to valid question." (emphasis supplied)

While the Secretary based his reluctance to press the Imperial matter further on considerations of fairness to those who had long relied on the Wilbur letter, he studiously avoided conceding that an inconsistency existed because Solicitor Harper himself was not informed of the status of water rights in the two districts. In his opinion, Solicitor Harper states:

"Although the language of the letter of Secretary Wilbur seems broad enough to include the Coachella Valley District lands, the letter was clearly intended only to apply to the Imperial Irrigation lands. It apparently assumes that all privately owned land in the District was under irrigation and has a vested water right. Nothing in the files indicates whether such is the factual situation, and there is strong indication that the Coachella Valley lands are to a very large degree as yet not irrigated."

There was of course ample data then available to show that in Imperial Valley there were in excess of 400,000 acres receiving pre-project irrigation in reliance on rights to Colorado River water. The major weakness of the Harper decision as it relates to Imperial Valley is its failure to deal with this question of pre-project water rights. There was much discussion of how section 14 of the Project Act

made that act a supplement to reclamation law, but no discussion of Congressional recognition of pre-existing rights under the Colorado River Compact found in sections 6, 8, and 13 of the Project Act. As has been noted in the discussion of statutory language, there is no inconsistency between a prohibition on charges for the use, storage and delivery of water and an acreage limitation provision, but there is such an inconsistency between recognizing the preexisting rights and enforcing acreage limitation. The extent of pre-project development is the heart of the difference between the Imperial and Coachella situations, and this is why Secretary Krug's statement of what he would do if an inconsistency existed at that time does not represent serious and informed criticism of the Wilbur policy. That it was even less a rejection of that policy is evidenced, in part, by the negotiation in 1952 of a supplemental contract with the Imperial Irrigation District which made no mention of acreage limitation.29 In Article 17 the supplemental contract reaffirmed the contract of December, 1932. Such reaffirmance expressly continued in effect the 1932 covenants with reference to the satisfaction of perfected rights, the controlling effect of the Colorado River compact and the other provisions of the 1932 contract earlier mentioned herein.

On February 5, 1958, Solicitor Bennett of the Department of the Interior wrote the Solicitor General of the Department of Justice in connection with the then pending

²⁹ Former Solicitor of the Department Edward Weinberg, who participated in these contract negotiations, testified that the Department had considered including an acreage limitation clause in the contract, but that this item was dropped because the Department was then preoccupied with the problem of treaty commitments to Mexico for delivery of water. Also, it was recognized that the District would not have signed a contract incorporating acreage limitation. After considering these factors, the Department was of the opinion that inclusion of acreage limitation for private lands would be "counter-productive."

case of Arizona v. California, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542, and the question posed by Arizona in the oral argument therein as to whether the 160-acre limitation was applicable to the lands of the Imperial Irrigation District. Solicitor Bennett stated:

"The water contract between the United States and the Imperial Irrigation District was executed December 1, 1932, some 25 years ago. The negotiations leading to the contract were lengthy and extensively in the public view. Except at the time of court confirmation, I am not aware of any challenge as to the legality of the contract during this entire period. Water has been delivered to the lands of Imperial District pursuant to the contract since the early 1940's. I am not aware that any administrative action has been proposed or taken either by the preceding administration or by this one to recognize or enforce application of the 160-acre limitation to the lands of the Imperial Irrigation District.

"The United States acting through the then Secretary of the Interior accepted the contract as having been confirmed and acting thereon proceeded to initiate construction of the All-American Canal and engage upon a variety of transactions in reliance upon the validity of the contract. There must surely arise a point of time, again I believe long since past, when the contract in keeping with the terms of Article 31 became binding upon the United States and the District. To treat otherwise at this date could have farreaching effect." (emphasis supplied)

This history of the administrative practice has necessarily been selective, but a thorough review of Departmental policy has failed to disclose a departure from the interpretation initiated by Secretary Wilbur until 1964. This interpretation was followed during the incumbencies of six successor Secretaries and four Presidential administrations.³⁰ From time to time during the period 1933-

³⁰ Secretary Ickes under Presidents Roosevelt and Truman; Secretaries King and Chapman under President Truman; Secre-

1964, a few individual members of the Department expressed doubt as to the validity of the Wilbur opinion, but these doubts never crystallized into an official repudiation. The Supreme Court commented on a similar situation in United States v. Midwest Oil Co., 236 U.S. 459, 472-473, 35 S.Ct. 309, 313, 59 L.Ed. 673 (1915):

"It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself,—even when the validity of the practice is the subject of investigation."

VIII. CONGRESSIONAL KNOWLEDGE AND APPROVAL OF THE WILBUR INTERPRETATION

The failure of Congress to revise a statute or take other affirmative action with respect to an administrative interpretation of a statute is often competent evidence that the interpretation is congruent with the legislative design. Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 53 S.Ct. 350, 77 L.Ed. 796 (1933). Cf. Red Lion Broadcasting Co., Inc. v. Federal Communication Commission, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969); Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed. 2d 179 (1965).

Congress for more than 30 years was fully aware of the 1933 ruling and interpretation of Secretary Wilbur and of

taries McKay and Seaton under President Eisenhower. During his tenure under President Kennedy, Secretary Udall did not disturb the interpretation.

the administrative practice predicated thereon. The Imperial Valley situation in light of such interpretation and practice was called to its attention in appropriation hearings for the construction and operation of the All-American Canal, at the hearings on the Central Valley and San Luis projects and at the hearings on the Small Projects Act of 1958.

Beginning in 1943, efforts were made in Congress to exempt the Central Valley Project of California from the acreage limitation. These attempts generated a fierce debate over the basic policy of land limitation, which continued for more than three years. In the end, advocates of the 160-acre limitation were successful as regards its application to Central Valley. While the inapplicability of the acreage law to Imperial Valley was repeatedly cited to Congress, the validity of that position went unchallenged. On the contrary, the Bureau of Reclamation never flagged in its support of the Wilbur ruling. Typical is the testimony of Assistant Commissioner Warne before a Subcommittee of the Senate Commerce Committee in connection with the Omnibus Rivers and Harbors bill of 1944:

"Representative ELLIOTT: Why was the limitation lifted in the Southern part of California down in the Imperial Valley? Why was the 160-acre limitation lifted? That applied there, just the same as it did elsewhere.

"MR. WARNE: No, there was never a 160-acre limitation applied to the Imperial Valley.

"Representative ELLIOTT: It came under the same Act, the Act of 1902.

"MR. WARNE: No, I am sorry, I think you will find that the Boulder Canyon Act authorized the All-American Canal, and that the provision did not apply there except as to public lands * * *."³¹

³¹ Hearings on H.R. 3961, before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess., Part IV, page 599 (1944).

In addition to the foregoing, copies of the Bureau of Reclamation's excess land surveys of 1946 and 1964 were filed with Congress.

At no time from 1933 to the present has Congress taken any action in derogation of the propriety of the Wilbur interpretation or of the long standing administrative practice which followed it.

It has been observed that to attribute significance to the inaction of Congress is often a "shaky business." In this case, however, some weight must attach to this knowing inaction. Congress would hardly have ignored the Department's failure to enforce an important provision of reclamation law. *Accord*, United States v. Gerlach Livestock Co., 339 U.S. 725, 735-736, 70 S.Ct. 955, 94 L.Ed. 1231 (1950).

The court accordingly holds that the defendant Imperial Irrigation District is not bound by the land limitation provisions of reclamation law in the delivery of Colorado River water to any of the privately owned lands within the boundaries of Imperial Irrigation District.

The court further holds that the land limitation provisions of reclamation law have no application to privately owned lands lying within the Imperial Irrigation District.

Counsel for defendants may present an appropriate judgment.

³² Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers, 367 U.S. 396, 408-409, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1960).

APPENDIX E

United States District Court Southern District of California

UNITED STATES OF AMERICA,

Plaintiff,

v.

IMPERIAL IRRIGATION DISTRICT, a corporation,

Defendant.

JOHN M. BRYANT, et al.,

Landowner defendants, both individually and on behalf of members of a class, to wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District,

STATE OF CALIFORNIA,

Intervening Defendant.

BEN YELLEN, et al.,

Applicants for Intervention.

CIVIL NO. 67-7-T

March 29, 1971

ORDER DENYING APPLICANTS' MOTION TO INTERVENE

This cause came on regularly for hearing before the court on the application of Ben Yellen et al. to intervene of right pursuant to Rule 24(a)(2); the United States of America appearing by Assistant United States Attorney, Raymond Zvetina; Imperial Irrigation District appearing by R. L. Knox, Jr; John M. Bryant, et al, appearing by O'Melveny & Myers, Pierce Works and Charles W. Bender; State of California, intervenor, appearing by Deputy Attorney General Neil Gobar; and Ben Yellen, et al by Arthur Brunwasser. Applicants for intervention have moved for an order permitting intervention; for leave of court to take the deposition of Mr. David Warner, Chief of Litigation, Lands and Natural Resources Division, Department of Justice; and for an order staying implementation of the judgment entered on February 9, 1971, until ten days after the ruling on these pending motions. The motion to stay implementation of the judgment is hereby ordered denied because there will be no delay in the issuance of the court's ruling. The motion for leave to take the deposition of Mr. David Warner is denied because there is no showing of the necessity therefor. The United States has no duty to disclose its decision concerning appeal during the sixty-day period within which an appeal may be taken.

The court finds that the application to intervene is timely made. Intervention after judgment is permissible if there is no substantial prejudice to the other parties. This litigation is now in its fourth year, and the limited nature of the participation sought, that of appeal, does not disturb the prior proceedings.

All of the defendants assert that the judgment in the 1933 case of Hewes v. All Persons (Civil No. 15460, Superior Court, Imperial County, California) is res judicata as to the applicants for intervention. Proceedings in the Hewes case were instituted pursuant to Article 31 of the December 11, 1932 contract between the United States and the Imperial Irrigation District and § 511 of Title 43 of the United States Code. The object of the suit was to

determine the validity of the 1932 contract. In this action the question of whether the 160-acre limitation had application to privately owned lands within the District was litigated, and it was held there that the acreage limitation did not apply.

It appears that this proceeding in rem was intended to and did bind all persons claiming any right, title or interest in property located within the Imperial Irrigation District and that accordingly the intervention is precluded as a collateral attack upon a judgment entitled to full faith and credit.

However, regardless of the effect of the Hewes decision. it is incumbent upon the applicants to demonstrate "an interest relating to the property or transaction which is the subject of the action." Rule 24(a)(2) Federal Rules of Civil Procedure. The interest supporting intervention has been described as a "direct, substantial, legally protectible interest in the proceedings." Hobson v. Hansen, 44 F.R.D. 18 (1968) The applicants here assert that they desire to buy excess land which may be sold if the government ultimately prevails in this lawsuit and is able to enforce acreage limitation in the Imperial Irrigation District, but this "interest" is no greater than that possessed by the general public. Several specific factors in this case illustrate how extremely speculative and remote is the interest asserted here. Before any possible sale of excess lands, the initial decision in the first phase of the lawsuit must be reversed on appeal. If this occurs, then there will be a second lengthy trial concerning the nature and extent of the landowner defendants' vested rights to Colorado River Water. If the government prevailed in that phase, a plan for disposition would have to be proposed and executed. In all probability, there would be some recognition of the added value of the land due to the efforts of the current landowners. Applicants have shown no present ability to purchase and no prior offers within the past twenty years to purchase farm land in the Imperial Valley at market

value. Because this is not a class action intervention, the capability of the named applicants to purchase the lands they desire is material. Furthermore, the requirement of reclamation law for recordable contracts to be approved by the Secretary of the Interior is in no way inconsistent with the customary and usual right of a seller to choose his purchaser. Finally, if the Secretary of the Interior were able to take a more active role in the disposition of excess lands, there would quite likely be a veterans' preference for entry which would put a large class ahead of the present applicants. Cf. 43 U.S.C. §§ 186, 279.

It is also required that the interest of applicants for intervention be inadequately represented by existing parties. The court has observed the vigorous representation by counsel for United States in urging that acreage limitation applies in the Imperial Irrigation District and finds that the interest of applicants, if any, has heretofore and is now being adequately represented by plaintiff.

Accordingly, it is ordered that the motion for leave to intervene be, and the same hereby is, denied.

DATED: March 29, 1971.

/s/ Howard B. Turrentine United States District Judge

APPENDIX F

Relevant Portions of the 1964 Decree in Arizona v. California

[376 U.S. 340] ARIZONA v. CALIFORNIA ET AL. No. 8, Original. Decided June 3, 1963.—Decree entered March 9, 1964

Decree carrying into effect this Court's opinion of June 3, 1963, 373 U.S. 546.

IT IS ORDERED, ADJUDGED AND DECREED THAT

I. For purposes of this decree:

* * * * * *

- (D) "Regulatory structures controlled by the United States" refers to Hoover Dam, Davis Dam, Parker Dam, Headgate Rock Dam, Palo Verde Dam, Imperial Dam, Laguna Dam and all other dams and works on the mainstream now or hereafter controlled or operated by the United States which regulate the flow of water in the mainstream or the diversion of water from the mainstream;
- (E) "Water controlled by the United States" refers to the water in Lake Mead, Lake Mohave, Lake Havasu and all other water in the mainstream below Lee Ferry and within the United States;

(G) "Perfected right" means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use;

(H) "Present perfected rights" means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act;

* * * * *

- II. The United States, its officers, attorneys, agents, amd employees be and they are hereby severally enjoined:
- (A) From operating regulatory structures controlled by the United States and from releasing water controlled by the United States other than in accordance with the following order of priority:
- (1) For river regulation, improvement of navigation, and flood control;
- (2) For irrigation and domestic uses, including the satisfaction of present perfected rights; and
 - (3) For power;

* * * * *

- (B) From releasing water controlled by the United States for irrigation and domestic use in the States of Arizona, California, and Nevada, except as follows:
- (1) If sufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy 7,500,000 acre-feet of annual consumptive use in the aforesaid three States, then of such 7,500,000 acre-feet of consumptive use, there shall be apportioned 2,800,000 acre-feet for use in Arizona, 4,400,000 acre-feet for use in California, and 300,000 acre-feet for use in Nevada;
- (2) If sufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use in the aforesaid States in excess of 7,500,000 acre-feet, such excess consumptive use is surplus, and 50% thereof shall be apportioned for use in Arizona and 50% for use in California; provided, however, that if the United States so contracts with Nevada, then

46% of such surplus shall be apportioned for use in Arizona and 4% for use in Nevada;

- (3) If insufficient mainstream water is avaliable for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,000 acre-feet in the aforesaid three States, then the Secretary of the Interior, after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines and after consultation with the parties to major delivery contracts and such representatives as the respective States may designate, may apportion the amount remaining available for consumptive use in such manner as is consistent with the Boulder Canyon Project Act as interpreted by the opinion of this Court herein, and with other applicable federal statutes, but in no event shall more than 4,400,000 acre-feet be apportioned for use in California including all present perfected rights;
- (5) Notwithstanding the provisions of Paragraphs (1) through (4) of this subdivision (B), mainstream water shall be released or delivered to water users (including but not limited to public and municipal corporations and other public agencies) in Arizona, California, and Nevada only pursuant to valid contracts therefor made with such users by the Secretary of the Interior, pursuant to Section 5 of the Boulder Canyon Project Act or any other applicable federal statute;

APPENDIX G

No. 8, Orig. STATE OF ARIZONA, Plaintiff,

U.

STATE OF CALIFORNIA et al.

On Joint Motion to Enter Supplemental Decree and Motions for Leave to Intervene. [January 9, 1979]

PER CURIAM

The United States of America, Intervenor, State of Arizona, Complainant, the California Defendants (State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, County of San Diego), and State of Nevada, Intervenor, pursuant to Art VI of the Decree entered in the case on March 9, 1964, at 376 US 340, and amended on February 28, 1966, at 383 US 268, have agreed to the present perfected rights to the use of mainstream water in each State and their priority dates as set forth herein. Therefore, it is hereby OR-DERED, ADJUDGED, AND DECREED that the joint motion of the United States, the State of Arizona, the California Defendants, and the State of Nevada to enter a supplemental decree is granted and that said present perfected rights in each State and their priority dates are determined to be as set forth below

* * * * *

The Imperial Irrigation District in annual quantities not to exceed (i) 2,600,000 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901.

APPENDIX H

CALIFORNIA, IN AND FOR THE COUNTY OF IMPERIAL.

IN THE MATTER OF THE VALIDATION OF)
A CONTRACT, DATED DECEMBER 1, 1932,	í
ENTITLED "CONTRACT FOR CONSTRUCTION	í
OF DIVERSION DAM, MAIN CANAL AND	í
APPURTENANT STRUCTURES, AND FOR	í
DELIVERY OF WATER" BETWEEN THE	í
UNITED STATES OF AMERICA AND IM-	,
PERIAL IRRIGATION DISTRICT, THE EXE-	,
CUTION OF WHICH WAS AUTHORIZED AT	,
AN ELECTION HELD IN SAID DISTRICT ON	,
THE 12TH DAY OF JANUARY, 1933.	1
No. 1546	30
EVAN T. HEWES, IRA ATEN, WILLIAM E. YOUNG,)
BURLEIGH ADAMS, AND MARK ROSE, AS AND CON-)
STITUTING THE BOARD OF DIRECTORS OF IMPERIAL)
IRRIGATION DISTRICT AND IMPERIAL IRRIGATION)
DISTRICT,)
Plaintiffs.	
ALL PERSONS INCLUDING)
ALL PERSONS, INCLUDING ALL THOSE IN ANY WAY)
INTERESTED OR TO BE INTERESTED IN THAT CERTAIN)
CONTRACT, DATED DECEMBER 1, 1932, ENTITLED,)
"CONTRACT FOR CONSTRUCTION OF DIVERSION)
DAM, MAIN CANAL AND APPURTENANT STRUC-)
TURES, AND FOR DELIVERY OF WATER," BETWEEN)
THE UNITED STATES OF AMERICA AND IMPERIAL)
IRRIGATION DISTRICT, THE EXECUTION OF WHICH)
WAS AUTHORIZED AT AN ELECTION HELD IN SAID)
DISTRICT ON THE 12TH DAY OF JANUARY, 1933,)
AND ALL THOSE HAVING OR CLAIMING ANY RIGHT,)
TITLE OR INTEREST IN OR LIEN OR CLAIM UPON THE)
PROPERTY WITHIN SAID DISTRICT OR ANY PART)
THEREOF, AND ALL REAL PROPERTY WITHIN SAID)
DISTRICT.)
Defendants.)

FINDINGS OF FACT AND CONCLUSIONS OR LAW.

The above entitled cause came on regularly for trial, and was tried at the Court Room of the above entitled Court in the City of El Centro, County of Imperial, State of California, commencing on the 16th. day of March, 1933, before the Court sitting without a jury, a jury trial having been waived, Hon. Emmet H. Wilson, Judge presiding, upon the complaint, the demurrer and answer of the defendants. Coachella Valley County Water District, A. B. Cliff, John H. Colbert, R. C. Egnew, J. C. Jones and Washington McIntyre, and upon the answer of the defendant Charles Malan. Chas. L. Childers and D. B. Roberts, of El Centro, California, appearing as counsel for the plaintiffs; and W. G. Irving of Riverside, California, and Stewart, Shaw and Murphey of Los Angeles, California, appearing as counsel for Coachella Valley County Water District; A. B. Cliff, John H. Colbert, R. C. Egnew, J. C. Jones and Washington McIntyre, and M. W. Conkling, of San Diego, California, appearing as counsel for Charles Malan; that summons herein was duly and properly issued as provided by law, and was served upon all defendants in the manner provided by law, and the order of this Court duly and properly made, by publication thereof in Imperial Valley Press, a newspaper of general circulation published in the County of Imperial where this action was and is pending, said paper having been designated by order of this Court, for at least once a week for three weeks, and that the time within which the defendants or any of them are by law authorized to appear in said cause and answer or otherwise plead therein, to wit, ten days after the full publication of said summons, as above stated, had fully expired, and no defendant having appeared herein, except the defendants Coachella Valley County Water District, A. B. Cliff, John H. Colbert, R. C. Egnew, J. C. Jones, Washington Mc-Intyre and Charles Malan, the default of all of the defendants except those defendants hereinabove named and who had appeared herein was duly and regularly entered by

order of this Court. Upon suggestion to the Court that the term of office of the plaintiff John L. DuBois had, subsequently to the commencement of said action and prior to the trial thereof, expired and Even [sic] T. Hewes had been elected as Director of Imperial Irrigation District to succeed the said John L. DuBois and had duly qualified as such director, and that the term of office of the plaintiff W. O. Blair had expired subsequently to the commencement of said action and prior to the trial thereof, and that William E. Young had been elected as Director of Imperial Irrigation District to succeed the said W. O. Blair and had duly qualified as such director, upon motion of counsel for the plaintiffs, and good cause appearing therefor and there being no objection thereto it was ordered that Even [sic] T. Hewes be substituted as party plaintiff for and instead of the plaintiff John L. DuBois and that William E. Young be substituted as party plaintiff for and instead of the plaintiff W. O. Blair; that the demurrer of the defendants Coachella Valley County Water District, A. B. Cliff, John L. Colbert, R. C. Egnew, J. C. Jones and Washington McIntyre was thereupon presented to and fully considered by the Court and after hearing the argument of counsel was taken under submission and thereupon said cause proceeded to trial upon said complaint and answers and evidence, both oral and documentary, was offered by the respective parties and received by the Court and the evidence having been closed and the Court having heard the arguments of Counsel and being fully advised in the premises makes and files its Findings of Fact and Conclusions of Law, constituting the Court's decision in said cause as follows:

FINDINGS OF FACT.

FINDING No. 1.

That each and all of the allegations of the plaintiffs' complaint are true.

FINDING NO. 2.

That Imperial Irrigation District is and ever since on or about the 25th. day of July, 1911, has been an irrigation district duly and regularly organized and existing under and by virtue of the California Irrigation District Act, approved March 31, 1897, and the acts amendatory thereof and supplementary thereto and that said irrigation district is situated entirely within the County of Imperial, State of California, and is now, and at all times since on or about July 25, 1911, has been acting as and exercising the rights of an irrigation district under the laws of the state of California, and that the boundaries of said Imperial Irrigation District have not been changed since prior to July 1, 1931.

FINDING No. 3.

That at the date of the commencement of this action John L. DuBois, Ira Aten, W. O. Blair, Burleigh Adams and Mark Rose were and ever since prior to July 1, 1932, had been the duly elected or appointed qualified and acting directors of said Imperial Irrigation District and that during said time constituted the Board of Directors of said Imperial Irrigation District and the whole of said board of directors and that during all of said time the said John L. DuBois was the duly elected, qualified and acting President of said Board of Directors of Imperial Irrigation District, and that during all of said time F. H. McIver was the duly appointed, qualified and acting Secretary of the Board of Directors of Imperial Irrigation District and that during all of said time the office of said Board of Directors had been located in the city of El Centro, County of Imperial, State of California, which office had been and was the usual and regular place of meeting of said Board of Directors.

FINDING No. 4.

That prior to December 5, 1932, there was presented to Imperial Irrigation District and to its Board of Directors as hereinabove found, a proposed contract entitled "Contract for the Construction of Diversion Dam, Main Canal. and appurtenant structures and for Delivery of Water". between the United States of America and Imperial Irrigation District for the construction of a diversion dam in the main stream of the Colorado River and a Main Canal and appurtenant structures located entirely within the United States connecting said diversion dam with the Imperial and Coachella Valleys in California, and for the repayment of the cost thereof as provided in the Reclamation Law. Said proposed contract as executed as alleged in the plaintiffs' complaint being the same contract, a true and correct copy of which is attached to the plaintiffs' complaint marked Exhibit "A" and by reference thereto made a part of said complaint.

FINDING No. 5.

That said proposed contract was signed and executed as provided by law, by the United States of America acting for that purpose by Ray Lyman Wilbur, Secretary of the Interior on the 1st day of December, 1932.

FINDING No. 6.

That on the 5th. day of December, 1932, at a regular adjourned meeting of the Board of Directors of Imperial Irrigation District duly and regularly held on said day at the usual and regular place of meeting of said Board of Directors at least three members thereof being present and voting therefor, the said Board of Directors by resolution approved the said proposed contract as to form.

FINDING No. 7.

That after said Board of Directors had approved said proposed contract as to form as hereinabove found and on the same day, to-wit, on the 5th. day of December, 1932, and at the same meeting of said Board of Directors and at the same place, at least three members of said Board being present and voting therefor, by resolution directed the Secretary of said Board of Directors to submit the proposal to enter into said contract with the United States, as embodied in said proposed contract, with such plans and estimates of cost as had been made in connection therewith to the State Engineer of the State of California, for his examination and report as provided by law.

FINDING No. 8.

That thereafter and on the same day, towit, on the 5th. day of December, 1932, the Secretary of the Board of Directors of Imperial Irrigation District, agreeable to the resolution of said Board last above found, did submit said proposal to enter into contract with the United States as embodied in said proposed contract, together with such plans and estimates of cost as had been made in connection therewith, to wit, the engineering report of H. J. Gault, in evidence as Plaintiffs' Exhibit No. 4 to the State Engineer of the State of California, for his examination and report.

FINDING NO. 9.

That thereafter the State Engineer of the State of California, did make an examination of said proposal as embodied in said proposed contract and of the plans and estimates of cost as had been made in connection therewith and thereafter and on towit, the 14th. day of December, 1932, the said State Engineer did make his report thereon as provided by law in writing to the Board of Directors of Imperial Irrigation District and in said report approved said proposal as embodied in said proposed contract and the plans and estimates of cost as had been made in connection therewith and among other things found and declared that the water supply is ample, that the project is physically feasible, and can be constructed within the estimated cost, the land is susceptible of irrigation, the cost

will be justified by the benefits, and that the project as a whole is financially and economically sound and thereafter and on the 19th. day of December, 1932, filed said report and approval with the Secretary of the Board of Directors of Imperial Irrigation District.

FINDING No. 10.

That on towit the 5th. day of December, 1932, the Board of Directors of Imperial Irrigation District at a regular adjourned meeting of said Board duly and regularly held on said day at the usual and regular place of meeting of said Board at least three members thereof being present and voting therefor did by resolution direct the Secretary of said Board of Directors to submit the said proposal to enter into a contract with the United States as embodied in said proposed contract with such plans and estimates of cost as had been made in connection therewith to the California Districts Securities Commission for its examination and report.

FINDING No. 11.

That thereafter and on the same day, towit, on the 5th. day of December, 1932, the Secretary of the Board of Directors of Imperial Irrigation District, agreeable to the resolution of said Board of Directors last above found, did submit said proposal to enter into contract with the United States as embodied in said proposed contract, together with such plans and estimates of cost as had been made in connection therewith to the California Districts Securities Commission for its examination and report.

FINDING No. 12.

That thereafter the California Districts Securities Commission made its examination of said proposal as embodied in said proposed contract and of said plans and estimates of cost as had been made in connection therewith and thereafter and on the 16th. day of December, 1932, did make its report thereon as provided by law in writing to

the Board of Directors of Imperial Irrigation District and in and by the terms of said report approved said proposal as embodied in said proposed contract and the plans and estimates of cost as had been made in connection therewith and among other things found and declared that the supply of water available to the District now and as it may be enlarged under said contract is and will be ample, that the soil is fertile and susceptible to irrigation, that the plans and estimates of cost prepared in connection with the contemplated works and submitted to the said commission are adequate and that the cost will not exceed such estimate, that the project is feasible and for the best interest of said District, and thereafter and on the 19th. day of December, 1932, filed said report and approval with the Secretary of the Board of Directors of Imperial Irrigation District.

FINDING No. 13.

That plans and estimates of cost were made in connection with the proposal of said Imperial Irrigation District to enter into said proposed contract with the United Sates and consists of an engineering report by H. J. Gault dated May, 1931, and transmitted May 14, 1931, to the Chief Engineer of the Bureau of Reclamation at Denver, Colorado, a copy of said engineering report having been offered in evidence by the plaintiffs and received by the Court and marked Plaintiffs' Exhibit No. 4, and that said plans and estimates of cost were made pursuant to the terms of a cooperative contract, dated March 26, 1929, between Imperial Irrigation District, Coachella Valley County Water District and the United States of America acting for that purpose through Elwood Mead, Commissioner, Bureau of Reclamation, and that said plans and estimates of cost as embodied in said engineering report was approved by the Board of Directors of Imperial Irrigation District by resolution at a regular adjourned meeting of said Board duly and regularly held on the 29th day of November, 1932, at the usual and regular place of meeting of said Board at least three members thereof being present and voting therefor and that said plans and estimates of cost as embodied in said engineering report are the same plans and estimates of cost submitted with said proposal as embodied in said proposed contract by the Secretary of the Board of Directors of said District to the State Engineer of the State of California and to the California Districts Securities Commission as hereinabove found.

FINDING No. 14.

That on the 19th. day of December, 1932, the Board of Directors of Imperial Irrigation District at a regular adjourned meeting of said Board of Directors duly and regularly held on said day at the usual and regular place of meeting of said Board, at least three members thereof being present and voting therefor did by resolution determine and declare that the proposed plan of works as embodied in said proposed contract and in the said plans and estimates of cost made in connection therewith as herein last above found was satisfactory and that the project was feasible and that it was for the best interest of said Imperial Irrigation District and the land owners and assessment payers and water users thereof that said proposed contract be entered into and executed by Imperial Irrigation District and that it was thereby proposed by said Board of Directors that Imperial Irrigation District enter into and execute said proposed contract, upon the execution thereof being authorized by the qualified electors of Imperial Irrigation District as provided by law.

FINDING No. 15.

That thereafter and at the same meeting of said Board of Directors of Imperial Irrigation District as last above found and at the same place, on the 19th. day of December, 1932, the said Board of Directors of Imperial Irrigation District, at least three members thereof being present and voting therefor did by resolution order and call a special

election to be held throughout Imperial Irrigation District on Thursday the 12th. day of January, 1933, between the hours of six o'clock A.M. and seven o'clock, P.M., of said day, in the manner provided by law, for the purpose of submitting to the qualified electors of said Imperial Irrigation District the question whether or not said Imperial Irrigation District should be authorized to enter into and execute said proposed contract and did by said resolution provide for notice of said special election as required by law and specified the form and contents of such notice and did appoint for each election precinct in said District from the electors thereof one inspector, one judge, and one clerk to constitute the Board of Election for such precinct and at such special election and did in the order appointing the Board of Election designate the house or place within the precinct where said special election would be held and did order, designate and provide all matters and things necessary to the holding and conducting of said special election as required by law.

FINDING No. 16.

That notice of said special election, ordered and called as above found, to be held throughout Imperial Irrigation District on the 12th. day of January, 1933, in form and substance as specified in said resolution last above found and as required by law and as attached to and made a part of the plaintiffs' complaint herein, marked Exhibit "B" and by reference thereto made a part of said complaint, was given for the time and in the manner provided by law and the said resolution and order of said Board of Directors ordering and calling said special election, by the Secretary of the Board of Directors of Imperial Irrigation District, by posting said notice in three public places in each election precinct in said Imperial Irrigation District, and also in the office of said Board of Directors of said District for at least twenty days prior to the date of said special election, and that said Notice of said special election, among other things, specified the polling places of each precinct

and that said notice of said special election as hereinabove found and as attached to and by reference thereto made a part of the plaintiffs' complaint and marked Exhibit "C" was given as required by law and the resolution of the Board of Directors of Imperial Irrigation District ordering and calling said special election as hereinabove found, by publication of said notice in Imperial Valley Press, a newspaper of general circulation printed and published at El Centro, in said County of Imperial, State of California, where the office of the Board of Directors of Imperial Irrigation District is kept and that such publication was made once a week for at least three successive weeks prior to the date of said special election, to wit, said notice was so published on December 20, 1932, December 27, 1932, January 3, 1933, and January 10, 1933; that such notice so posted and published as hereinabove found specified among other things the time and place of holding the said special election and contained a statement of the maximum amount of money to be payable to the United States for construction purposes, cost of water supply, and acquisition of property, exclusive of penalties and interest, together with a general statement of the property to be conveyed by said Imperial Irrigation District.

FINDING No. 17.

That on the 12th. day of January, 1933, between the hours of six o'clock, A. M., and 7 o'clock, P.M. of said day, said special election was duly and regularly held throughout Imperial Irrigation District in the manner provided by law and by the said resolution and order of the Board of Directors of said Imperial Irrigation District of December, 19, 1932, ordering and calling the same as hereinabove found and pursuant to notice thereof given as also hereinabove found; that said special election was fairly conducted and the returns thereof duly and regularly transmitted by the respective officers of election of the respective election precincts and delivered to the Secretary of the Board of Directors of Imperial Irrigation District.

FINDING No. 18.

That the ballot used at said special election was of material and in the form provided by law and the said resolution of the Board of Directors of Imperial Irrigation District of December 19, 1932, ordering and calling said special election as hereinabove found and that said ballot contained in the proposition to be voted upon a brief statement of the general purpose of said proposed contract and the amount of the obligation to be assumed, to wit, a statement of the maximum amount of money to be payable to the United States for construction purposes, cost of water supply and acquisition of property, exclusive of penalties and interest, together with a general statement of the property to be conveyed by said Imperial Irrigation District, all as provided by law and the resolution of the Board of Directors of Imperial Irrigation District ordering and calling such special election and as contained in the notice thereof so posted and published both as hereinabove found. That the statement on said ballot of the proposition to be voted upon at said special election was and is in words and figures as set out in the plaintiffs' complaint in paragraph XVII thereof.

FINDING No. 19.

That Monday, the 16th day of January, 1933, was the first Monday after said special election; that on said date, to wit, Monday the 16th day of January, 1933, the returns of said special election from each and every precinct in the said Imperial Irrigation District had been duly and regularly received and thereupon the Board of Directors of said Imperial Irrigation District met in regular adjourned session and as provided by law at its usual and regular place of meeting in the city of El Centro, California, at least three members thereof being present, for the purpose of canvassing the returns of said special election; that the returns from each and every precinct in the said Imperial Irrigation District was then and there before said Board

and said Board did at said time and place canvass the returns of said special election in public by opening the returns and estimating the vote of the said District for and against the proposal to enter into and execute the said proposed contract and declaring the result thereof and by resolution, at least three members of said Board voting therefor, found and declared that at said special election there were 5676 votes cast upon said proposal of which 4947 were "Contract-Yes" and 729 votes were "Contract-No", and that 4947 votes were cast in favor of authorizing Imperial Irrigation District to enter into and execute said proposed contract and 729 votes were cast against authorizing said Imperial Irrigation District to enter into and execute said proposed contract; that more than twothirds of all the votes cast for and against said proposal to enter into and execute said proposed contract were cast in favor of authorizing Imperial Irrigation District to enter into and execute said proposed contract; that thereupon and at the same time and as a part of the said resolution of the Board of Directors of Imperial Irrigation District last above found said Board of Directors did find and declare that Imperial Irrigation District had at said special election been authorized to enter into and execute said proposed contract, and that the Secretary of the Board of Directors of Imperial Irrigation District did as soon as the said result was declared, enter in the records of the said Board of Directors a statement of such results, which statement showed and shows the total number of votes cast upon said proposal in the said District and in each division thereof, the proposal voted upon, and the total number of votes cast in each division in favor of said proposal and the total number of votes cast in each division against such proposal and the total number of votes cast in the said District in favor of said proposal and the total number of votes cast in said District against said proposal.

FINDING No. 20.

That at said special election there were 5676 votes cast upon said proposal to enter into said proposed contract, of which 4947 votes were in favor of Imperial Irrigation District entering into and executing said proposed contract and 729 votes were against Imperial Irrigation District entering into and executing said proposed contract; that more than two-thirds of all of the votes cast for and against said proposal to enter into and execute said proposed contract were cast in favor of authorizing Imperial Irrigation District to enter into and execute said proposed contract and that by said vote Imperial Irrigation District had been and was authorized to enter into and execute said proposed contract.

FINDING No. 21.

That thereafter and on the same day and at the same place and at the same meeting of said Board of Directors of said Imperial Irrigation District, on towit, the 16th. day of January, 1933, the Board of Directors of Imperial Irrigation District did by resolution at least three members of said Board voting therefor, authorize and direct John L. DuBois, the President of the Board of Directors of Imperial Irrigation District, to sign and execute said proposed contract in duplicate original for and on behalf of Imperial Irrigation District, and F. H. McIver, Secretary of said Board of Directors to attest the execution thereof and to affix thereto the seal of Imperial Irrigation District and make proper delivery of said contract to the Secretary of the Interior for the United States of America.

FINDING No. 22.

That thereafter and on the same day, towit, the 16th. day of January, 1933, the said John L. DuBois, as President of the Board of Directors of Imperial Irrigation District did sign and execute said proposed contract in duplicate original for and on behalf of Imperial Irrigation

District and F. H. McIver, as Secretary of the Board of Directors of Imperial Irrigation District and thereupon attested the execution thereof and affixed thereto the seal of Imperial Irrigation District and made due and proper delivery of said contract to the Secretary of the Interior for the United States of America, and that at said time and place Imperial Irrigation District executed said proposed contract theretofore signed and executed by the United States of America for this purpose by Ray Lyman Wilbur, Secretary of the Interior, and dated the 1st. day of December, 1932, and being the same contract, a true and correct copy of which is attached to the plaintiffs' complaint marked Exhibit "A" and by reference thereto made a part of said complaint.

FINDING No. 23.

That the defendant Coachella Valley County Water District is now and ever since on or about the 16th. day of January, 1918, has been a duly organized and existing county water district in the county of Riverside, State of California, under and by virtue of the laws of California. and particularly by an act of the Legislature of said State entitled: "An act to Provide for the Incorporation and Organization and Management of County Water Districts and to Provide for the Acquisition of Water Rights or Construction thereby of Water Works and for the acquisition of all property necessary therefor and also to provide for the distribution and sale of Water by said Districts" approved June 10, 1913, as amended, and that said Coachella Valley County Water District hereinafter in these Findings referred to as "Coachella District" is situate wholly within the County of Riverside and embraces within its boundaries approximately 997,000 acres of land including therein substantially all lands in said County of Riverside within that certain valley in said county commonly known and designated as the "Coachella Valley" and also certain mountainous lands on the east, west and north of said valley, which mountainous lands form a large part of

the water shed of said valley and that said Coachella Valley extends southeasterly for a distance of about 60 miles from the summit of San Gorgonio Pass at an elevation of about 2500 feet above sea level to the southerly boundary line of Riverside County at or near the Salton Sea at an elevation of approximately 250 feet below sea level.

FINDING No. 24.

That approximately 150,000 acres of land in said Coachella Valley and within said Coachella District lie within the "area to be included" in Imperial Irrigation District as set out and defined in the contract between Imperial Irrigation District and the United States, dated the 1st day of December, 1932, hereinabove in these Findings referred to.

FINDING No. 25.

That the climate in said Coachella Valley is arid and hot and the average annual rainfall is less than three inches; that because of said aridity, heat and limited rainfall, crops of commercial value cannot profitably be produced in said valley without regular and frequent irrigation with large quantities of water; that without sufficient water for irrigation of said lands, said lands would be of little or no value; that quantities of water annually fall in the form of rain or snow during the rainy season of each year upon the mountainous lands constituting the water shed of said valley and said water flows through natural streams into said valley and substantially all of said water sinks and percolates into underground strata of gravel and other porous substances beneath said valley. That much of said water can be recovered therefrom by means of wells.

FINDING No. 26.

That since about the year 1902, certain lands in Coachella Valley and within said "area to be included within Imperial Irrigation District as said area is defined in said contract dated the 1st. day of December, 1932, between

the United States of America and Imperial Irrigation District above mentioned, hereinafter in these findings referred to as "area to be included", have been developed. farmed, and irrigated with water produced by wells from said underground strata; that the area of lands in said "area to be included" thus developed and irrigated has gradually increased to about 15,000 acres; that the irrigation of said lands now cultivated consumes annually more than the quantity of water annually flowing into the said valley from said streams and that it is necessary in order that said 15,000 acres of developed and irrigated lands may be maintained and that additional lands in said valley be cultivated that an additional and supplementary supply of water be obtained and furnished for the irrigation of said lands in the said "area to be included": that no other adequate, practicable or feasible source of water supply for said valley is known to exist than the Colorado River; that adequate water for the irrigation of said lands in said Coachella Valley within said "area to be included" can be practicably and feasibly procured from the Colorado River by means of the canal provided for in the said contract between the United States of America and Imperial Irrigation District, dated the 1st day of December, 1932, hereinafter in these findings referred to as the "All American Canal".

FINDING No. 27.

That the lands in said Coachella District outside said "area to be included" will be benefited by the construction of the All American Canal and the use of water therefrom for irrigation within the said "area to be included".

FINDING No. 28.

(1) That in the year 1918, a movement for the construction of an All American Canal was initiated by communities and interests desirous of obtaining water from the Colorado River for the purpose of irrigation and domestic use in the Imperial and Coachella Valleys and other

areas; that said movement has since that time been commonly known and designated as the "All American Canal Project". That said Coachella Valley County Water District was organized for the primary purpose of furthering measures and legislation to effectuate the All American Canal Project and for the purpose of serving as the official representative of said Coachella Valley in relation to the furtherance of said Project and the administration of the interests of said valley in said Project. That from the time of its organization said Coachella District has consistently and continuously devoted its efforts to the furtherance of said Project for the benefit of said Coachella Valley.

(2) That on the 16th day of February, 1918, there was executed by and between the United States and the Imperial Irrigation District, hereinafter sometimes called "Imperial District", as agreement for the investigation, survey and cost-estimate of an All American Canal by a Board thereafter known as the All American Canal Board; that said Board thereafter reported, recommending the construction of such canal for the service of irrigation and domestic water to the Imperial Valley and reported that it was its belief that it would be necessary to construct in the future a high line canal to serve lands in the Imperial and Coachella Valleys.

That under date of October 23, 1918, there was executed by the United States and the Imperial District an agreement for the connection of the main canal of said Imperial District with that certain dam on the Colorado River commonly known and designated as the "Laguna Dam"; that said agreement provided for the construction of a main canal entirely within the United States from said Laguna Dam to the canal system of said Imperial District in the Imperial Valley; that in said agreement the United States reserved the right to arrange for the connection with and use of Laguna Dam on such terms as the Secretary of the Interior might deem expedient, by any other irrigation enterprise, district, corporation or individual; also of the

head works and main canal and other governmentally constructed works and works constructed jointly by the parties to said agreement, after proper enlargement and modification on terms stipulated therein, without, however, impairing the utilization of said dam, canal, and other works to the extent necessary to irrigate the lands within the boundaries of the Imperial Irrigation District.

That on the 17th day of June, 1919, there was introduced in the House of Representatives of the Congress of the United States a bill, known as the "First Kettner Bill". and numbered H. R. 6044, 66th Congress, 1st Session. providing for the construction of a canal and necessary works entirely within the United States, connecting the present irrigation system of said Imperial District with Laguna Dam and providing for use thereof by any other district or districts, including County Water Districts, which should issue and deposit with the Secretary of the Interior their bonds as a contribution to the cost of said works. Said bill provided that all moneys derived from the sale of unentered public lands of the United States in Imperial Valley and Coachella Valley, California, be used to guarantee payment of said bonds; that said bill was not enacted into law.

That on the 7th day of January, 1920, a bill was introduced in said House of Representatives, known as the "Second Kettner Bill", and numbered H.R. 11553, 66th Congress, 2d Session, authorizing the Secretary of the Interior to construct the above mentioned canal and works and to enter into contracts with the Imperial Irrigation District, the Coachella Valley County Water District and other districts and associations, for repayment of the cost of said works; that said bill was not enacted into law.

That on the 18th day of May, 1920, there was enacted by said Congress an act (41 Stat. 600) commonly known as the "Kincaid Act", whereby the sum of \$20,000.00 was appropriated for investigation and report upon an irrigation system to serve the lands in the Imperial Valley and adjacent thereto by diversion of water from the Colorado River at Laguna Dam, and thereafter such an investigation was made at the joint expense of the United States, said Imperial District and said Coachella District. That said Coachella District contributed and paid to the United States as its share of the cost of said investigation and report thereon the sum of \$6,000.00.

That on the 11th day of November, 1920, Arthur P. Davis, Director of the United States Bureau of Reclamation, addressed to said Coachella District and other districts, agencies and interests, a letter inquiring whether such districts, agencies and interests desired to participate in irrigation from the Colorado River. That by letter to said director, dated November 23, 1920, said Coachella District definitely informed said director that it desired to participate in said Project. That on February 28, 1922, Albert B. Fall, Secretary of the Interior, transmitted to said Congress his report under said Kincaid Act, by which said Secretary recommended the construction of said All American Canal for the benefit of said Imperial and Coachella Valleys, and also recommended the construction of a dam and reservoir at or near Boulder Canyon on said Colorado River.

That in pursuance of said recommendations there was introduced in said House of Representatives on April 25, 1922, a bill known as the "First Swing-Johnson Bill", and numbered H.R. 11449, 67th Congress, 2d Session, for the construction of said dam at or near Boulder Canyon and a main canal and appurtenant structures for the diversion of water from said Colorado River at the Laguna Dam and delivery of water for irrigation and domestic use to the Imperial and Coachella Valleys; that said bill was not enacted into law.

That there was introduced in said House of Representatives on December 10, 1923, a bill for the like purposes,

known as the "Second Swing-Johnson Bill", and numbered H.R. 2903, 68th Congress, 1st Session; said bill was not enacted into law.

That there was introduced in the said House of Representatives on December 21, 1925, a bill for like purposes, known as the "Third Swing-Johnson Bill", and numbered H.R. 6251, 69th Congress, 1st Session; that said bill was not enacted into law.

That there was introduced in said House of Representatives on December 5, 1927, a bill for like purposes, known as the "Fourth Swing-Johnson Bill", and numbered H.R. 5773, 70th Congress, 2d Session, and that said bill was thereafter, on the 21st day of December, 1928, enacted into law (45 Stat. 1057) and is now known and designated as the "Boulder Canyon Project Act".

That on the 26th day of March, 1929, said Coachella District, said Imperial District and the United States entered into an agreement for the contribution by each of said entities to a fund for the purpose of making investigations, surveys and cost-estimates of the All American Canal from the Colorado River to the Imperial and Coachella Valleys, as authorized by the Boulder Canyon Project Act; that under and pursuant to said agreement, said Coachella District contributed and paid to the United States as its share of the cost of said investigation the sum of \$10,000.00. That investigations were made pursuant to said agreement and a report was prepared by H. J. Gault, as hereinbefore found.

- (3) That the allegations contained in Paragraph VIII of the First Defense contained in the Answer of the defendants, Coachella Valley County Water District et al., are true.
- (4) That at all times since the year 1919 it has been contemplated that the lands in said Coachella District in said "area to be included" were a part of the area to be

benefited and served with water under said Project, and that said lands in said Coachella District have been, in each of said legislative measures in said Congress, specified and mentioned as beneficiaries of said measures; that each and all of the acts and proceedings of said Coachella District in relation to said Project have been had and taken in pursuance of said facts and in reliance upon the participation in said Project of said lands in said Coachella District, as a part of the area to be served by said All American Canal. That in the furtherance of said All American Canal Project, said Coachella District has expended, from the funds derived by it from taxation upon property in said Coachella District, amounts of money exceeding in the aggregate the sum of \$150,000.00.

FINDING No. 29.

That the greater part of the lands within said Coachella District is unproductive desert land, but is held in private ownership; that with water provided for irrigation by said All American Canal said unproductive lands in said "area to be included" can be intensively developed for specialty crops such as dates, grapefruit and early grapes, and will produce profitable crops of great value, and said lands will. by reason of the supply of water from the Colorado River. become of very great value, whereas said lands without such water have little value; that, acting in reliance upon and in contemplation of receiving water from the Colorado River to serve said lands in said Coachella District, the landowners owning said unproductive lands have for more than fifteen years last past continued to pay taxes to said Coachella District and to the County of Riverside; that had said land owners not anticipated and relied upon receiving water from Colorado River, they would have failed and refused to pay such taxes, and the greater portion of said Coachella District would long since have been deeded to the State of California for delinquent taxes, as provided by law.

FINDING No. 30.

That each of the defendants, A. B. Cliff, John H. Colbert, R. C. Egnew, J. C. Jones and Washington McIntyre is the owner of lands in said Coachella District and within the "area to be included."

FINDING No. 31.

That the defendant Charles Malan is the owner of more than 160 acres of land within Imperial Irrigation District and is an assessment payer and taxpayer therein.

FINDING No. 32.

That the maximum amount of money to be payable by said Imperial Irrigation District to the United States under said contract between the United States and said Disdated the 1st. day of December, 1932, for construction purposes, cost of water supply and acquisition of property exclusive of penalties and interest was and is accurately and correctly stated in both the notice of said special election posted and published as hereinabove found and on the ballot used at said special election, also as hereinabove found; that the maximum amount of money to be payable by Imperial Irrigation District to the United States under and by the terms of said contract for construction purposes, cost of water supply and acquisition of property exclusive of penalties and interest will not exceed \$38,500,000 together with \$768,000 still unpaid at the date of said special election under Article 9 of a certain contract between the United States and Imperial Irrigation District of October 23, 1918; that no damage will result to the lands or property of sundry and numerous or any persons above said proposed dam or at all if and when works described and provided for in said contract are actually constructed and used as provided in said contract, and that said works will not cause any land belonging to other persons to be flooded and waterlogged and damaged or flooded or waterlogged or damaged and that no damage will extend over

or upon any part of the lands embraced in the Palo Verde Irrigation District and no damage will thus be caused by the United States or by Imperial Irrigation District or otherwise to any property due to the existence, operation or maintenance of the diversion dam and main canal described or referred to in the said contract, or for any other reason.

FINDING No. 33.

That no statement, matter or thing was inserted in said notice or in said ballot or omitted from said notice or from said ballot for the purpose of deceiving the voters of said Imperial Irrigation District and/or causing said voters or any of them erroneously to believe that the total amount of obligation assumed to the United States by said contract for construction purposes, cost of water supply, and acquisition of property exclusive of penalties and interest was the sum of \$38,500,000 and that no person or voter in Imperial Irrigation District was misled or deceived by any statement in said notice of special election or in the ballot used thereat but that all persons and all voters within Imperial Irrigation District were fully, completely and accurately informed by said notice and in said ballot of the maximum amount of money to be payable to the United States for construction purposes, cost of water supply and acquisition of property exclusive of penalties and interest and were also fully and accurately informed by said notice and in said ballot of the property to be conveyed by the District to the United States, and of all obligations to be assumed by said District.

FINDING No. 34.

That the making of the said canal provided for by said Contract between the United States of America and Imperial Irrigation District, dated the 1st day of December, 1932, of the capacity of 10,000 cubic feet of water per second from Pilot Knob to Engineer Station 1907 is not a

capacity more than double the amount of any water which can possibly be used by the said Imperial Irrigation District, or any amount in excess of anticipated reasonable requirements of said District and that said canal and said capacity or either is not intended solely and entirely or either or intended at all for the purpose of conveying water to lands outside of said Imperial Irrigation District, and which may never be a part of the said Imperial Irrigation District.

FINDING No. 35.

That under said Contract between the United States and Imperial Irrigation District, dated the 1st day of December, 1932, the delivery of water will not be limited to 160 acres in a single ownership and that the lands of the defendant Charles Malan in excess of 160 acres will not be denied water because of the size of said ownership, and that water service to lands regardless of the size of ownership will not be in any manner affected by said contract, so far as the size of individual ownership is concerned.

FINDING No. 36.

The obligation to provide capacity in the canal contemplated by said contract between the United States and Imperial Irrigation District, dated the 1st day of December, 1932, for the benefit of the Yuma Project of the United States Bureau of Reclamation provided for by said contract is fully and adequately supported by a good, valuable and adequate consideration.

FINDING No. 37.

That certain power possibilities, consisting of drops at which power may be generated, upon the construction of said canal, will exist at Pilot Knob and elsewhere upon said canal; that it is not true that in the event the capacities of the canal provided for in said contract between the United States and Imperial Irrigation District dated the 1st day of December, 1932, are reduced by reason of the

failure of the lands in Coachella Valley and within the said area to be included to petition for inclusion or to be included within Imperial Irrigation District within the time limit provided in said contract for such inclusion the owners of land situate within the Coachella Valley and within the "area to be included" will be deprived of water or the possibility of obtaining water from the Colorado River by any practicable or feasible means for the irrigation of said lands or for domestic use thereon.

FINDING No. 38.

That said contract between the United States and Imperial Irrigation District, dated the first day of December, 1932, is not illegal and is not invalid and is not unauthorized and is not void for the reasons or for any of the reasons stated, mentioned or alleged in any of the defenses contained in either or any of the answers of any of the defendants herein or illegal or invalid or unauthorized or void for any reason or at all.

CONCLUSIONS OF LAW

I

That each and every act necessary to be done or performed both by the United States and by Imperial Irrigation District and their respective officers necessary to be done or performed in order to make said contract between the United States of America and Imperial Irrigation District dated the 1st day of December, 1932, a legal and binding contract between the United States of America and Imperial Irrigation District has been fully and completely done and performed and that all acts or proceedings by other agencies or officers necessary to be done or performed to that end have likewise been duly, regularly and fully done, and performed, and that each and all of said acts were done and performed within the time and in the manner provided by law and that said Contract was

duly and properly executed prior to the commencement of this action as hereinabove found and that since said execution said contract has been and now is the legal and binding contract in all respects of the United States of America and Imperial Irrigation District.

II

That said contract between the United States and Imperial Irrigation District, dated the first day of December, 1932, is not illegal and is not invalid and is not unauthorized and is not void for the reasons or for any of the reasons stated, mentioned or alleged in any of the defenses contained in either or any of the answers of any of the defendants herein or illegal or invalid or unauthorized or void for any reason or at all.

III

That this action and these proceedings were commenced and prosecuted pursuant to and in the manner provided by law and that summons herein in form and substance as provided by law was duly and regularly issued and served upon all defendants in the manner provided by law and the order of this Court duly and properly and lawfully given and made and that after full and complete service of said summons upon all defendants had been made as provided by law and in accordance with said order of this Court and the time provided by law for appearance having expired the default of the defendants, namely: all persons, including all those in anyway interested or to be interested in that certain Contract, dated December 1, 1932, entitled "Contract for Construction of Diversion Dam, Main Canal, and Appurtenant Structures, and for Delivery of Water", between the United States of America and Imperial Irrigation District, the execution of which was authorized at an election held in said District on the 12th day of January, 1933, and all those having or claiming any right, title or interest in or lien or claim upon the property within said District or any part thereof, and all real property within said District, was duly and regularly entered upon order of this Court, regularly and properly and lawfully made and given, except as to the defendants Coachella Valley County Water District, A. B. Cliff, John H. Colbert, R. C. Egnew, J. C. Jones, Washington Irving [sic], and Charles Malan who had appeared and answered herein.

IV

That this action is authorized by law as an action in rem and that the Court has jurisdiction of the subject matter and of all parties herein.

V

That said contract involved in these proceedings and dated the 1st. day of December, 1932, and entitled, "Contract for Construction of Diversion Dam, Main Canal and Appurtenant Structures and for Delivery of Water" between the United States of America and Imperial Irrigation District for the construction of a diversion dam in the main stream of the Colorado River and a main canal and appurtenant structures located entirely within the United States connecting said diversion dam with the Imperial and Coachella Valleys in California, and for the repayment of the cost thereof as provided in the reclamation law, a true and correct copy of said contract being attached to the complaint in this action marked Exhibit "A" and by reference thereto made a part of said complaint is the valid and legal contract in all respects of the parties thereto.

VI

That each and every term, condition, article, section and clause of said contract is legal and valid and that said contract is legal and valid and within the lawful powers of the United States of America and of Imperial Irrigation District to enter into, make and execute.

VII

That Ray Lyman Wilbur, Secretary of the Interior of the United States of America, was duly and lawfully authorized to execute said contract on behalf of the United States of America, and that the said Ray Lyman Wilbur did execute said contract on behalf of the United States of America and the United States of America did thereby execute said contract and was and is in all respects fully bound thereby.

VIII

That on the 12th. day of January, 1933, a special election was held throughout Imperial Irrigation District, at which was submitted to the qualified electors of said District the proposition of whether or not Imperial Irrigation District should be authorized to enter into and execute said contract and that said special election was called, held and conducted in all respects as provided by law and that each and every act or proceeding necessary in or to the calling and holding of said special election was done and performed by the proper officers lawfully authorized to do and perform such acts and proceedings and that said special election was in all respects regular, valid and legal. That said special election was fairly and regularly conducted and the result thereof was properly and regularly declared within the time and manner provided by law and properly and lawfully entered in the proper and lawful records of Imperial Irrigation District.

IX

That the dully qualified electors of Imperial Irrigation District by their vote at said special election properly and lawfully authorized Imperial Irrigation District to enter into and execute said contract.

X

That the Board of Directors of Imperial Irrigation District and the Secretary of said Board of Directors did and

performed every act and proceeding necessary to the lawful execution of said contract and were fully and legally authorized to execute and did execute said contract as provided by law for and on behalf of Imperial Irrigation District and that thereby Imperial Irrigation District executed said contract and that said contract thereupon became and is the lawful contract of Imperial Irrigation District and that Imperial Irrigation District is fully and in all respects bound thereby.

XI

That neither the United States nor Imperial Irrigation District is limited by the terms of said contract or by any law applicable thereto in the delivery of water to any maximum acreage of land held in a single ownership.

XII.

That the plaintiffs are entitled to judgment against all defendants as prayed for in the plaintiffs' complaint. Dated, July 1, 1933.

/s/ EMMETT H. WILSON
JUDGE OF THE SUPERIOR COURT.

ENDORSED
FILED JUL. 3, 1933
EDWARD H. LAW, COUNTY CLERK
BY G. O. KENYON, DEPUTY

THE FOREGOING INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE ATTEST: May 3, 1956

HARRY M. FREE

COUNTY CLERK AND CLERK OF THE SUPERIOR COURT IN
AND FOR THE COUNTY OF IMPERIAL, STATE OF
CALIFORNIA
By /s/ LUCILE MORRISON, DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF IMPERIAL.

IN THE MATTER OF THE VALIDATION OF A CONTRACT, DATED DECEMBER 1, 1932, ENTITLED "CONTRACT FOR CONSTRUCTION OF DIVERSION DAM, MAIN CANAL AND APPURTENANT STRUCTURES, AND FOR DELIVERY OF WATER" BETWEEN THE UNITED STATES OF AMERICA AND IMPERIAL IRRIGATION DISTRICT, THE EXECUTION OF WHICH WAS AUTHORIZED AT AN ELECTION HELD IN SAID DISTRICT ON THE 12TH DAY OF JANUARY, 1933.

No. 15460

EVAN T. HEWES, IRA ATEN, WILLIAM E. YOUNG, BURLEIGH ADAMS, AND MARK ROSE, AS AND CONSTITUTING THE BOARD OF DIRECTORS OF IMPERIAL IRRIGATION DISTRICT AND IMPERIAL IRRIGATION DISTRICT, Plaintiffs,

US.

ALL PERSONS, INCLUDING ALL THOSE IN ANYWAY INTERESTED OR TO BE INTERESTED IN THAT CER-TAIN CONTRACT, DATED DECEMBER 1, 1932, EN-TITLED. "CONTRACT FOR CONSTRUCTION OF DIVERSION DAM, MAIN CANAL AND APPURTEN-ANT STRUCTURES, AND FOR DELIVERY WATER", BETWEEN THE UNITED STATES OF AMERICA AND IMPERIAL IRRIGATION DISTRICT, THE EXECUTION OF WHICH WAS AUTHORIZED AT AN ELECTION HELD IN SAID DISTRICT ON THE 12TH DAY OF JANUARY, 1933, AND ALL THOSE HAVING OR CLAIMING ANY RIGHT, TITLE OR IN-TEREST IN OR LIEN OR CLAIM UPON THE PROP-ERTY WITHIN SAID DISTRICT OR ANY PART THEREOF, AND ALL REAL PROPERTY WITHIN SAID DISTRICT. Defendants

JUDGMENT.

The above entitled cause came on regularly for trial, and was tried at the Court Room of the above entitled Court in the city of El Centro, County of Imperial, State of California, commencing on the 16th day of March, 1933, before the Court sitting without a jury, a jury trial having been waived. Hon. Emmet H. Wilson, Judge presiding, upon the complaint, the demurrer and answer of the defendants, Coachella Valley County Water District, A. B. Cliff, John H. Colbert, R. C. Egnew, J. C. Jones and Washington McIntyre, and upon the answer of the defendant Charles Malan, Chas. L. Childers and D. B. Roberts of El Centro, California, appearing as counsel for the Plaintiffs and W. G. Irving of Riverside, California, and Stewart, Shaw & Murphy of Los Angeles, California, appearing as counsel for Coachella Valley County Water District, A. B. Cliff, John H. Colbert, R. C. Egnew, J. C. Jones and Washington McIntyre, and M. W. Conkling, of San Diego, California, appearing as counsel for Charles Malan. Upon suggestion to the Court that the term of office of the plaintiff John L. DuBois had, subsequent to the commencement of said action, and prior to the trial thereof, expired and Evan T. Hewes had been elected as Director of Imperial Irrigation District to succeed the said John L. DuBois and had duly qualified as such director, and that the term of office of the plaintiff W. O. Blair had expired subsequent to the commencement of said action and prior to the trial thereof, and that William E. Young had been elected as Director of Imperial Irrigation District to succeed the said W. O. Blair and had duly qualified as such director, upon motion of counsel for the plaintiffs, and good cause appearing therefor and there being no objection thereto it was ordered that Evan T. Hewes be substituted as party plaintiff for and instead of the plaintiff John L. DuBois and that William E. Young be substituted as party plaintiff for and instead of the plaintiff W. O. Blair and it appearing to the satisfaction of the Court that this is an

action in rem authorized by law and that summons herein was duly and properly issued as provided by law and was served upon all defendants in the manner provided by law and the order of this Court duly and properly made and that the time within which the defendants or any of them are by law authorized to appear in said cause and answer or otherwise plead therein had fully expired, the default of all of said defendants, except those defendants hereinabove named who had appeared therein was duly and regularly entered and it further appearing that the Board of Directors of Imperial Irrigation District, within the proper time, brought this action in the above named Court in the County of Imperial, State of California, where the office of the said Board of Directors is and was at all times since prior to July 1, 1932, located and that the Court had and has jurisdiction of the subject matter and of the parties and all of them and Findings of Fact and Conclusions of Law constituting the Court's decision in this cause having been duly made and filed,

Now, therefore, it is hereby ordered, adjudged AND DECREED that that certain contract entitled, "Contract for the Construction of Diversion Dam. Main Canal and Appurtenant Structures and for Delivery of Water" between the United States of America and Imperial Irrigation District for the construction of a diversion dam in the main stream of the Colorado River and a main canal and appurtenant structures located entirely within the United States connecting said diversion dam with the Imperial and Coachella Valleys in California and for the repayment of the cost thereof as provided in the Reclamation Law, a true and correct copy of said contract being attached to the plaintiffs' complaint in this action marked Exhibit "A" and by reference thereto made a part of said complaint, is and each and every article, clause, section and part thereof is lawful and valid and that the Board of Directors and officers of Imperial Irrigation District and the officers of the United States of America, who purport-

ed to have executed or caused said contract to be executed. were fully, duly, and lawfully authorized to enter into and execute said contract for and on behalf of Imperial Irrigation District and of the United States of America, respectively, and that each and every act, thing and proceeding necessary to be done, had, taken or performed to that end was done, had, taken or performed at and within the time provided by law and in the form and manner provided by law and by the proper officer or officers or person or persons, and that said contract was and is in all respects properly and lawfully executed and is, in all respects, the contract of Imperial Irrigation District and the United States of America, and that Imperial Irrigation District and the United States of America are fully and lawfully authorized in all respects to comply with and fully and completely carry out the terms and provisions of said contract as provided and contained therein; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants Coachella Valley County Water District, A. B. Cliff, John H. Colbert, R. C. Egnew, J. C. Jones and Washington McIntyre, and Charles Malan, who have appeared in this action take nothing by their alleged defenses and that the plaintiff recover of and from said named defendants their costs herein, taxed at \$

Dated, July 1, 1933.

/s/ Emmet H. Wilson

Judge of the Superior Court.

Entered July 5, 1933 at 4:30 P M. Book 16, Judgments Page 323

ENDORSED
FILED July 3 1933
HARRY M. FREE
COUNTY CLERK
By C. O. KENYON
DEPUTY

154a

THE FOREGOING INSTRUMENTS IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE ATTEST: May 3 1956 HARRY M. FREE

County Clerk and Clerk of the Superior Court, in and for the County of Imperial, State of California.

BY /s/ Lucile Morrison DEPUTY

APPENDIX I

Relevant Provisions of the Boulder Canyon Project Act

Sec. 1. Dam at Black or Boulder Canvon for flood control, improving navigation, and for storage and delivery of water-Main canal to supply water for Imperial and Coachella Valleys-Power plant-All works in conformity with Colorado River compact. |- For the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact hereinafter mentioned, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside of the Imperial and Coachella Valleys: Provided, however, That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; also to construct and equip.

operate, and maintain at or near said dam, or cause to be constructed, a complete plant and incidental structures suitable for the fullest economic development of electrical energy from the water discharged from said reservoir; and to acquire by proceedings in eminent domain, or otherwise, all lands, rights of way, and other property necessary for said purposes. (45 Stat. 1057; 43 U.S.C. §617)

Sec. 4. (a) [When Act effective—Ratification of Colorado River compact-Proclamation by President-Agreement by California required-Agreement authorized by Arizona, California, and Nevada-Apportionment of waters-Consumptive use of Gila River by Arizona-Water for domestic and agricultural use. |- This act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California. by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall provide (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters in the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin, and (5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses, and (6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact, and (7) said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California, and Nevada. (45 Stat. 1058; 43 U.S.C. §617c(a))

(b) [Contracts required for revenues to insure payment of expenses of operation and maintenance, etc., and repayment of construction within 50 years, before any money is appropriated-Work on main canal contingent on provision to insure payment of expenses—Payments to Arizona and Nevada. - Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this act.

Before any money is appropriated for the construction of said main canal and appurtenant structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

If during the period of amortization the Secretary of the Interior shall receive revenues in excess of the amount necessary to meet the periodical payments to the United States as provided in the contract, or contracts, executed under this act, then, immediately after the settlement of such periodical payments, he shall pay to the State of Arizona 18¾ per centum of such excess revenues and to the State of Nevada 18¾ per centum of such excess revenues. (45 Stat. 1059; 43 U.S.C. §617c(b)).

Sec. 5. [Contracts for storage of water and its delivery, and for generation and sale of electrical energy-Congress to prescribe basis of charges—Revenues to be in separate fund. (a) Time limit of 50 years on contracts for electrical energy-Contracts to be made with view of returns-Readjustment of contracts upon demand. (b) Renewal of electrical energy contracts. (c) Contracts to be made with responsible applicants for meeting revenues required-Adjustment of conflicting applications. (d) Contracting agencies for electrical energy may be required to share in benefits. |- The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal water power act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first. to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: *Provided, however,* That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the

applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined by the said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

(d) Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary. from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy. (45 Stat. 1060; 43 U.S.C. §617d)

Sec. 6. [River regulation, improvement of navigation, flood control—Irrigation and domestic use—Power—Title of dam to remain in United States—Contracts of lease of a unit or units of Government-built plant with right to generate electrical energy—Rules and regulations regarding maintenance of works to be in conformity with Federal water power act—Issuance of power permits or licenses.]—The dam and reservoir provided for by section 1 hereof

shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir. plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: Provided, however. That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or, alternatively, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provisions of section 5 of this act relating to revenue, term, renewals. determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.

The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal water power act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture and/or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this act or penalizing failure to comply with such regulations or with the provisions of this act. He shall also conform with other provisions of the Federal water power act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal water power act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California until this act shall become effective as provided in section 4 herein. (45 Stat. 1061; 43 U.S.C. §617e)

* * * * *

Sec. 8. [(a) Colorado River compact to control in use of water. (b) Use of water also governed by compact among States of the lower division.]—(a) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of

water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided*, That in the latter case, such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress. (45 Stat. 1062; 43 U.S.C. §617g)

Sec. 9. [Withdrawal of all irrigable lands-Entry under reclamation law-Preference in entry to soldiers.]-All lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior, such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, in accordance with the provisions of the reclamation law, and any such entryman shall pay an equitable share in accordance with the benefits received, as determined by the said Secretary, of the construction cost of said canal and appurtenant structures; said payments to be made in such installments and at such times as may be specified by the Secretary of the Interior, in accordance with the provisions of the said reclamation law, and shall constitute revenue from said project and be covered into the fund herein provided for: Provided, That all persons who served in the United States Army, Navy, Marine Corps, or Coast Guard during World War II, the War with Germany, the War with Spain, or in the suppression of the insurrection in the Philippines, and who have been honorably separated or discharged therefrom or placed in the Regular Army or Naval Reserve, shall have the exclusive preference right for a period of three months to enter said lands, subject, however, to the provisions of subsection (c)

of section 4 of the Act of December 5, 1924 (43 Stat. 672. 702; 43 U.S.C., sec. 433); and also, so far as practicable, preference shall be given to said persons in all construction work authorized by this act: Provided further, That the above exclusive preference rights shall apply to veteran settlers on lands watered from the Gila canal in Arizona the same as to veteran settlers on lands watered from the All-American canal in California: Provided further, That in the event such an entry shall be relinquished at any time prior to actual residence upon the land by the entryman for not less than one year, lands so relinquished shall not be subject to entry for a period of sixty days after the filing and notation of the relinquishment in the local land office, and after the expiration of said sixty-day period such lands shall be open to entry, subject to the preference in this section provided. (45 Stat. 1063; Act of March 6. 1946, 60 Stat. 36; 43 U.S.C. §617h.)

Sec. 12. [Definitions of terminology employed.]—...

"Reclamation law" as used in this act shall be understood to mean that certain act of the Congress of the United States approved June 17, 1902, entitled "An Act appropriating the receipts from the sale and disposal of public land in certain certain States and Territories to the construction of irrigation works for the reclamation of arid lands", and the acts amendatory thereof and supplemental thereto.

... (45 Stat. 1064; 43 U.S.C. §617k).

* * * * *

Sec. 14. [This act a supplement to the reclamation law.]—This act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided. (45 Stat. 1065; 43 U.S.C. §617m)

Sec. 18. [Rights of States to waters within their borders.]—Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement. (45 Stat. 1065; 43 U.S.C. §617q)

* * * * *

APPENDIX J COLORADO RIVER COMPACT

ARTICLE VIII

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situated.

* * * * *

APPENDIX K

Section 1 of the 1922 Act to Provide for to Application of the Reclamation Law to Irrigation Districts

* * * * *

Sec. 1. Application of reclamation law to irrigation districts-Individual water-right applications dispensed with. |- In carrying out the purposes of the act of June 17, 1902 (Thirty-second Statutes, page 388), and acts amendatory thereof and supplementary thereto, and known as and called the reclamation law, the Secretary of the Interior may enter into contract with any legally organized irrigation district whereby such irrigation district shall agree to pay the moneys required to be paid to the United States, and in such event water-right applications on the part of landowners and entrymen, in the discretion of the Secretary of the Interior, may be dispensed with. In the event of such contract being made with an irrigation district, the Secretary of the Interior, in his discretion, may contract that the payments, both for the construction of irrigation works and for operation and maintenance, on the part of the district shall be made upon such dates as will best conform to the district and taxation laws of the respective States under which such irrigation district shall be formed; and if he deem it advisable, he may contract for such penalties or interest charges in case of delinquency in payment as he may deem proper and consistent with such State laws, notwithstanding the provisions of sections 1, 2, 3, 5, and 6 of the reclamation extension act approved August 13, 1914 (Thirty-eighth Statutes, page 686). The Secretary of the Interior may accept a partial payment of the amount due from any district to the United States, providing such acceptance shall not constitute a waiver of the balance remaining due nor the interest or penalties, if any, accruing upon said balance: Provided, That no contract with an irrigation district under this act shall be binding on the United States until the proceedings on the part of the district for the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid. (42 Stat. 541; 43 U.S.C. §511)

* * * * *

APPENDIX L

Section 301 (b) of the Colorado River Basin Storage Project Act

[Sec. 301] (b) Article II (b) (3) of the decree of the Supreme Court of the United States in Arizona against California (376 U.S. 340) shall be so administered that in any year in which, as determined by the Secretary, there is insufficient main stream Colorado River water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada, diversions from the main stream for the Central Arizona Project shall be so limited as to assure the availability of water in quantities sufficient to provide for the aggregate annual consumptive use by holders of present perfected rights, by other users in the State of California served under existing contracts with the United States by diversion works heretofore constructed, and by other existing Federal reservations in that State, of four million four hundred thousand acre-feet of mainstream water, and by users of the same character in Arizona and Nevada. Water users in the State of Nevada shall not be required to bear shortages in any proportion greater than would have been imposed in the absence of this subsection 301(b). This subsection shall not affect the relative priorities, among themselves, of water users in Arizona, Nevada, and California which are senior to diversions for the Central Arizona Project, or amend any provisions of said decree, (82 Stat. 887; 43 U.S.C. §1521)

APPENDIX M

Relevant Provisions of the 1902 Reclamation Act

Sec. 3. [Withdrawal of lands for irrigation works—Withdrawal of lands susceptible of irrigation-Homestead entries-Determination whether project is practicable-Restoration and entry-Commutation.]-The Secretary of the Interior shall, before giving the public notice provided for in section 4 of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act: and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: Provided, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry: that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: Provided. That the commutation provisions of the homestead laws shall not apply to entries made under this act. (32 Stat. 388; 43 U.S.C. §§ 416, 432, 434)

* * * * *

Sec. 5. [Reclamation requirements for entrymen-No water for more than 160 acres of private lands in one ownership-Residence of landowner-Receipts to reclamation fund. |- The entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section 4. No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. All moneys received from the above sources shall be paid into the reclamation fund. (32 Stat. 389; §1. Act of December 16, 1930, 46 Stat. 1029; §8, Act of September 6, 1966, 80 Stat. 639; 43 U.S.C. §§392, 431, 439)

* * * * *

Sec. 8. [Irrigation laws of States and Territories not affected-Interstate streams-Water rights. |-Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis. the measure, and the limit of the right. (32 Stat. 390: 43 U.S.C. §§372, 383)

APPENDIX N

Section 46 of the Omnibus Adjustment Act of 1926, as amended

* * * *

Sec. 46. [No water delivery on new projects until contracts made by district for payment of costs-Cooperation of States-Appraisal and sale of lands in private ownership in excess of 160 acres-No water if owner refuses to sell-Payment required before right to receive water-Payments of operation and maintenance charges annually in advance-Public notice when water available. - No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to. and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located whereby such State or States shall cooperate with the United States in promoting the settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised

in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: Provided, however, That if excess land is acquired by foreclosure or other process of law, by conveyance in satisfaction of mortgages, by inheritance, or by devise, water therefor may be furnished temporarily for a period not exceeding five years from the effective date of such acquisition, delivery of water thereafter ceasing until the transfer thereof to a landowner duly qualified to secure water therefor: Provided further, That the operation and maintenance charges on account of lands in said projects and division shall be paid annually in advance not later than March 1. It shall be the duty of the Secretary of the Interior to give public notice when water is actually available, and the operation and maintenance charges payable to the United States for the first year after such public notice shall be transferred to and paid as a part of the construction payment. (44 Stat. 649; Act of July 11, 1956, 70 Stat. 524; 43 U.S.C. §423e)

* * * *

APPENDIX O

Section 1738 of the Judicial Code

Sec. 1738. The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial prodeedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. (62 Stat. 947, 28 U.S.C. § 1738)

APPENDIX P

UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF RECLAMATION

BOULDER CANYON PROJECT

ALL-AMERICAN CANAL

CONTRACT FOR CONSTRUCTION OF DIVERSION DAM, MAIN CANAL, AND APPURTENANT STRUCTURES AND FOR DELIVERY OF WATER

ARTICLE 1. This contract, made this 1st day of December nineteen hundred thirty-two, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canvon Project Act, between The United States of America, hereinafter referred to as the United States, acting for this purpose by Ray Lyman Wilbur. Secretary of the Interior, hereinafter styled the Secretary, and Imperial Irrigation District, an irrigation district created, organized and existing under and by virtue of the laws of the State of California, with its principal place of business at El Centro, Imperial County, California, hereinafter referred to as the District:

Witnesseth:

EXPLANATORY RECITALS

ART. 2. Whereas, for the purpose of controlling the floods, improving navigation, and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters for reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary, subject to the terms of the Colorado River Compact, is authorized to construct, operate, and maintain a dam and incidental works in the main stream

of the Colorado River at Black Canyon or Boulder Canyon, adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water, and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary is also authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable as provided in the reclamation law; and

- ART. 3. Whereas, after full consideration of the advantages of both the Black Canyon and Boulder Canyon dam sites, the Secretary has determined upon Black Canyon as the site of the aforesaid dam, hereinafter styled the Hoover Dam, creating thereby a reservoir to be hereinafter styled the Boulder Canyon Reservoir; and
- ART. 4. Whereas there are included within the boundaries of the District areas of private and public lands, and additional private and public lands will by appropriate proceedings be included within the District, and the District is desirous of entering into a contract for the construction of a suitable diversion dam and main canal and appurtenant structures, hereinafter respectively styled Imperial Dam and All-American Canal, located entirely within the United States connecting with the Imperial and Coachella Valleys, and for the delivery to the District of stored water from Boulder Canyon Reservoir; and
 - ART. 5. Whereas the Secretary has determined, upon engineering and economic considerations, that it is advisable to provide for the construction of such diversion dam and main canal and appurtenant structures, and has determined that the revenues provided for by this contract are adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of the said diversion dam, main canal, and appurtenant structures in the manner provided in the reclamation law;

ART. 6. Now, therefore, in consideration of the mutual convenants herein contained, the parties hereto agree as follows, to wit:

CONSTRUCTION BY UNITED STATES

ART. 7. The United States will construct the Imperial Dam in the main stream of the Colorado River at the approximate location indicated on the map marked Exhibit A attached hereto and by this reference made a part hereof, and will also construct the All-American Canal and appurtenant structures to the Imperial and Coachella Vallevs, the approximate location of said canal to be as shown on the aforesaid Exhibit A. Said canal shall be constructed to a designed capacity of fifteen thousand (15,000) cubic feet of water per second from and including the diversion and desilting works at said dam to Syphon Drop; thirteen thousand (13,000) cubic feet of water per second from Syphon Drop to Pilot Knob, and ten thousand (10,000) cubic feet of water per second westerly from Pilot Knob to Engineer Station nineteen hundred and seven as said Engineer Station is indicated on said Exhibit A. Other portions of said canal shall be constructed with such capacities as the Secretary may conclusively determine to be necessary or advisable upon engineering or economic considerations to accomplish the ends contemplated by this contract; provided, however, that changes in capacities, locations, lengths and alignments, may be made during the progress of the work as may, in the opinion of the Secretary, whose opinion shall be final and binding upon the parties hereto, be expedient, economical, necessary or advisable, except the capacities above indicated from and including the diversion and desilting works at Imperial Dam to Engineer Station nineteen hundred and seven as hereinabove in this article referred to, which capacities may be changed only by mutual agreement between the Secretary and the District. The ultimate cost to the District of the aforesaid works shall in no event exceed the aggregate sum of thirtyeight million, five hundred thousand dollars (\$38,500,000).

Such cost shall include all expenses of whatsoever kind heretofore or hereafter incurred by the United States from the Reclamation Fund or the Colorado River Dam Fund in connection with, growing out of, or resulting from the construction of said diversion dam, main canal and appurtenant structures, including but not limited to the cost of labor, materials, equipment, engineering, legal work, superintendence, administration, overhead, any and all costs arising from operation and maintenance of said dam, main canal and appurtenant structures prior to the time that said costs are assumed by the District, damage of all kinds and character and rights-of-way as hereinafter provided. The District hereby agrees to repay to the United States expenditures incurred on account of any and all damages due to the existence, operation or maintenance of the diversion dam and main canal, the incurrence of which increases expenditures by the United States beyond said sum of \$38,500,000. The United States will invoke all legal and valid reservations of rights-of-way under acts of Congress, or otherwise reserved or held by it, without cost to the District, except that the United States reserves the right where rights-of-way are thus acquired to reimburse the owners of such lands for the value of improvements which may be destroyed, and the District agrees that the United States may include such disbursements in the cost of the work to be performed hereunder. If rights-of-way are required over an existing project of the Bureau of Reclamation, such sum or sums as may be necessary to reimburse the United States on account of the construction charges allocated to irrigable areas absorbed in such rights-of-way shall also be considered as a part of and be included with other costs of the work to be performed hereunder. The District agrees to convey to the United States without cost, unencumbered fee simple title to any and all lands now owned by it, which, in the opinion of the Secretary may be required for right-of-way purposes for the aforesaid diversion dam, main canal and appurtenant structures. Where rights-of-way within the State of California are required for the construction of works herein provided for, and such rights-of-way are not reserved to the United States under acts of Congress, or otherwise, or the lands over which such rights-of-way are required are not then owned by the District, the District agrees that it will, upon request of the Secretary, acquire title to such lands, and in turn convey unencumbered fee simple title thereto to the United States at the actual cost thereof to the District, subject to the approval of such cost by the Secretary.

ASSUMPTION OF OPERATION AND MAINTENANCE BY DISTRICT

ART. 8. Upon sixty (60) days' written notice from the Secretary of the completion of construction of the aforesaid diversion dam, main canal and appurtenant structures, or of any major unit thereof, useful to the District, as determined by the Secretary, whose determination thereof shall be final and binding upon the parties hereto. the District shall assume the care, operation, and maintenance of said diversion dam, main canal and appurtenant structures or major units thereof, including Laguna Dam, and thereafter the District shall at its own cost and without expense to the United States care for, operate, and maintain the same in such manner that such works shall remain in as good and efficient condition and of equal capacity for the diversion, transportation and distribution of water as when received from the United States, reasonable wear and damage by the elements excepted. Operation and maintenance of Imperial Dam by the District is a part of the obligation undertaken under this contract by the District for the transportation and delivery of water to public and Indian lands of the United States, and shall not interfere with the control of such dam by the United States. The United States may, from time to time, in the discretion of the Secretary, resume operation and maintenance of said dam upon not less than 60 days' written notice and require reassumption thereof by the District on

like notice. During such times, after completion, as the dam is operated and maintained by the United States, the District shall on March 1 of each year advance to the United States the estimated cost of operation and maintenance for the following twelve months, upon estimates furnished therefor on or before September 1st next preceding. After the care, operation and maintenance of the aforesaid works have been assumed by the District, the District shall save the United States, its officers, agents and employees harmless as to any and all injury and damage to damage to persons and property which may arise out of the care, operation and maintenance thereof. In the event the United States fails to complete the works herein contemplated and the District fails to elect to make use of the works theretofore partially or wholly constructed, the District shall be fully relieved of any and all responsibility for any further operation and maintenance of the works theretofore taken over by the District for that purpose and thereupon the District shall no longer be responsible for said maintenance or operation or damage to person or property which may arise therefrom.

KEEPING DIVERSION DAM, MAIN CANAL AND APPURTENANT STRUCTURES IN REPAIR

ART. 9. Except in case of emergency no substantial change in any of the works to be constructed by the United States and transferred to the District under the provisions hereof shall be made by the District without first having had and obtained the written consent of the Secretary and the Secretary's opinion as to whether any change in any such works is or is not substantial shall be conclusive and binding upon the parties hereto. The District shall promptly make any and all repairs to and replacements of all works constructed hereunder or transferred to it under the terms and conditions hereof, which, in the opinion of the Secretary, are deemed necessary for the proper operation and maintenance of such works. In case of neglect or fail-

ure of the District to make such repairs, the United States may, at its option, after reasonable notice to the District, cause such repairs to be made and charge the actual cost thereof, plus fifteen per centum (15%) to cover overhead and general expense, to the District. On or before September first of each calendar year the United States shall give written notice to the District of the amount expended by the United States for repairs under this article during the twelve-month period immediately preceding. Such cost, plus overhead and general expense as stated above, shall be repaid by the District on March first immediately succeeding.

AGREEMENT BY DISTRICT TO PAY FOR WORKS CONSTRUCTED BY THE UNITED STATES

ART. 10. (a) The District agrees to pay the United States the actual cost, not exceeding thirty-eight million five hundred thousand dollars (\$38,500,000), incurred by the United States on account of the aforesaid works, subject, however, to the provisions of Article seven (7) hereof; provided, that should Congress fail to make necessary appropriations to complete the work herein provided for, then the Secretary may, at such reasonable time as he may consider advisable, after Congress shall have failed for five consecutive years to make the necessary appropriations which shall have been annually requested by the Secretary, give the District notice of the termination of work by the United States and furnish a statement of the amount actually expended by the United States thereon. Upon the receipt of such notice by the District the District shall be given two years from and after such receipt of notice to elect whether it will utilize said works theretofore constructed, or some particular part thereof. Such election on the part of the District shall be expressed by resolution of the Board of Directors submitted to the electorate of the District for approval or rejection in the manner provided by law for submission of contracts with the United States. If the District elects not to utilize, or fails within said two-

year period to elect to utilize said works or some portion thereof, then the District shall have no further rights therein and no obligations therefor. If the District elects to utilize said works or a portion thereof, then the reasonable value to the District of the works so utilized not exceeding the actual cost thereof to the United States shall be paid by the District under the terms of this contract; the first payment to be due and payable on the first day of March following the first day of September next succeeding the final determination of the reasonable value to the District of such works, in case no further work is done by the District. Should the District elect to complete the work contemplated by this contract, or some portion thereof, the first payment shall be due and payable on the first day of March following the first day of September next succeeding the date of final completion of the work by the District as determined by the Secretary. In determining the value of such works to the District there shall be taken into account, among other things, the method of financing required and cost of money, so that in no event shall all of the works contemplated by this contract cost the District more than they would have cost the District had they all been constructed by the United States under the terms of this contract. In the event of failure of the parties to agree as to the reasonable value to the District of the works which the District elects to use, the same shall be determined as provided in Article twenty-seven (27) hereof.

(b) The District as a whole is obligated to pay to the United States the full amount herein agreed upon regardless of the default or failure of any tract in the District, or of any landowner in the District, in the payment of the assessments levied by the District against such tract or landowner, and the District shall, when necessary, levy and collect appropriate assessments to make up for the default or delinquency of any tract of land or of any landowner in the payment of assessments, so that in any event, and regardless of any defaults or delinquincies in the pay-

ment of any assessment or assessments, the amounts due or to become due the United States shall be paid to the United States by the District when due.

- (c) The District shall be divided into units by the Board of Directors of the District. Said units shall be named, commencing with Imperial Unit, which unit shall comprise the lands of the District as of July 1, 1931. Each of the other units shall be as determined by the Board of Directors of the District and shall be described by legal description of the lands embraced therein or by designation of exterior boundaries or otherwise suitable for identification. Additional lands may be added to any unit herein or hereafter designated.
- (d) The lands within each unit as hereinabove provided for will be benefited by the works to be constructed under this contract in the proportion that the area within such unit bears to the total area of the District and the costs of the said works, construction and otherwise, shall be apportioned to and paid by the lands within each unit in that proportion. In levying assessments or other charges to meet the cost of the said works, the Board of Directors of the District shall take into consideration payments to be made under this contract, with proper allowance for existing and anticipated delinquencies and redemptions, in order to provide sufficient funds to meet such payments as same become due and said board shall also take into account all sums expended or to be expended under the contract of October 23, 1918, for the right to connect with the Laguna Dam, the cost of all surveys and investigations and other expenditures properly chargeable as a part of the cost of the said works but which are not included as a part of the construction cost thereof reimbursable to the United States under this contract. While the cost of the said works and other expenditures above-mentioned shall be apportioned to the various units according to their respective areas, it is understood that the assessments or other charges to be imposed upon the lands within each

respective unit shall be on an ad valorem or other basis as now or may hereafter be provided by law for assessment or imposition of other charges upon lands within irrigation districts. Rates of assessment or schedule in the various units from year to year or from time to time may be different or unequal as between the various units.

If the amount collected from the lands in any unit in any year shall be less than the amount apportioned to such unit for that year for such purpose, the deficit shall nevertheless be charged to that unit and any fund or funds of the District from which money may be taken to make up such deficit in order to provide for the payment in full of the obligations of the District, shall be entitled to reimbursement for such money from subsequent collections of unpaid assessments or charges in said unit or from the amounts received for the redemption of lands sold for delinquent assessments or charges or from subsequent or additional levies made on the lands within that unit to provide for such reimbursement.

(e) In the event lands now or hereafter within Coachella Valley County Water District, a county water district organized and existing under the laws of the State of California, are included within Imperial Irrigation District, the said Coachella Valley County Water District shall have the privilege, at its option, if, as, and when authorized to do so by law, to pay to Imperial Irrigation District the total amount of any annual and/or special assessments levied by the last named District upon said lands or any installment of such assessments or any of the several individual assessments or installments thereof, in any case as the same become due and payable. The regular and lawful proceedings, rights and remedies of the last named District shall be in no manner impaired or affected by the provisions of this subarticle. The agreement in this subarticle contained is made expressly for the benefit of said Coachella Valley County Water District.

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- (f) If for any reason only a part of the works herein contemplated is constructed either by the United States or by the District, then the Board of Directors of the District shall, after public hearing, determine whether or not all of the lands in the District are benefited by the works constructed. If the Board shall find and declare that any certain lands within the District are not benefited by such construction, then no assessments shall thereafter be levied upon such lands for the purpose of meeting the obligations under this contract; and, for the purpose of this subarticle, no land shall be regarded as benefited by the construction of such works until the works contemplated by this contract as indicated on said Exhibit A from which water would reasonably be obtained for such lands shall have been constructed.
- (g) The District shall have the right to refuse water service to any lands within the District which may at any time be delinquent in the payment of any assessment levied for the purpose of carrying out the provisions of this contract.

CHANGES IN DISTRICT BOUNDARIES

ART. 11. After the date of this contract no change shall be made in the boundaries of the District and the Board of Directors shall make no order changing the boundaries of the District, unless and until the Secretary shall assent to such change in writing, and such assent shall have been filed with the Board of Directors of the District; provided, however, that such assent is hereby given for the inclusion of all of the lands indicated on Exbibit A referred to in Article 34 hereof.

TERMS OF PAYMENT

ART. 12. The amount herein agreed to be paid to the United States shall be due and payable in not more than forty (40) annual installments commencing with the calendar year next succeeding the year when notice of com-

pletion of all work provided for herein is given to the District or under the provisions of Article 10 (a) hereof upon termination of work through failure of Congress to make necessary appropriations therefor. The first five of such annual installments shall each be one per centum (1%) of the amount herein agreed to be paid to the United States; the next ten of such installments shall each be two per centum (2%) of the amount herein agreed to be paid to the United States, and the remainder of such annual installments shall each be three per centum (3%) of the amount herein agreed to be paid to the United States. The sums payable annually as set forth above shall be divided into two equal semiannual payments, payable on March first and September first of each year; provided, however, that if notice of the completion of work is given to the District subsequent to September first of any year the first semiannual installment of charges hereunder shall be due and payable on March first of the second succeeding year.

OPERATION AND MAINTENANCE COSTS

ART. 13. Each agency other than the District for which capacity is provided in the works to be constructed hereunder shall bear such proportionate part of the cost of operation and maintenance (including repairs and replacements) of the component parts thereof and of the Laguna Dam as may be determined by the Secretary to be equitable and just, but not less than an amount in proportion to the total amount as are the relative capacities provided in each component part for such agency and for all other agencies, including the District. Each agency shall advance to the District, on or before January first of each year, it its proportionate share of the estimated cost for that year of operation and maintenance in accordance with a notice to be issued by the District, provided that payment shall in no event be due until thirty days after receipt of notice. Prior to March 1st of each year the District shall provide each agency with a statement showing in detail

the costs for the previous year for operation and maintenance of the works on account of which such agency has made advances. Differences between actual costs and estimated costs shall be adjusted in next succeeding notices. Upon request of any agency both the advance notice of estimated costs and the subsequent statement of actual costs for each year shall be reviewed by the Secretary and his determination of proper charges shall be final. Such review shall not change the due date for advance payments as herein provided, and the cost of such review shall be borne equally by the requesting agency and the District. The District may, at its option, withhold the delivery of water from any agency until its proportionate share of the costs of operation and maintenance have been advanced or paid, as in this article provided.

POWER POSSIBILITIES

ART. 14. As one of the considerations for the partial termination of the contract of October 23, 1918, as provided for in Article sixteen (16) hereof, the power possibilities on the All-American Canal down to and including Syphon Drop with water carried for the benefit of the Yuma Project as provided for in Article fifteen (15) hereof, are hereby reserved to the United States. Subject to the foregoing provisions of this Article and the participation by other agencies as provided for in Article twenty-one (21) hereof, the District shall have the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal. The net proceeds as hereinafter defined in Article thirty-two (32) hereof and as determined by the Secretary for each calendar year from any such power development shall be paid into the Colorado River Dam Fund on March first of the next succeeding calendar year and be credited to the District on this contract until the District shall have paid thereby and/or otherwise an amount of money equivalent to that herein agreed to be paid to the United States. Thereafter such net power proceeds shall belong to the District. It is agreed that in the event the net power proceeds in any calendar year, creditable to the District, shall exceed the annual installment of charges payable under this contract during the then current calendar year, the excess of such net power proceeds shall be credited on the next succeeding unpaid installment to become due from the District under this contract.

DIVERSION AND DELIVERY OF WATER FOR YUMA PROJECT

ART. 15. As a further consideration for the partial termination of the contract of October 23, 1918, as provided in Article sixteen (16) hereof, the District hereby agrees to divert at the Imperial Dam, and to transport and deliver at Syphon Drop and/or such intermediate points as may be designated by the Secretary, the available water to which the Yuma Project (situated entirely within the United States and not exceeding in area 120,000 acres plus lands lying between the project levees and the Colorado River as such levees are located in 1931) is entitled, not exceeding two thousand (2.000) second-feet of water in the aggregate, or such part thereof as the Secretary may direct, for the use and benefit of said project, including the development of power at Syphon Drop, such water to be diverted, transported and delivered continuously insofar as reasonable diligence will permit, provided, however, that water shall not be diverted, transported or delivered for the Yuma Project when the Secretary notifies the District that said project for any reason may not be entitled thereto; provided, further, that the District shall divert, transport and deliver such water in excess of requirements for irrigation or potable purposes, as determined by the Secretary, on the Yuma Project as so limited, only when such water is not required by the District for irrigation or potable purposes. The diversion, transportation and delivery of water for the Yuma Project as aforesaid shall be without expense to the United States or its successors in

control of said project, as to capital investment required to provide facilities for such diversion and transportation of water, except such checks, turnouts and other structures required for delivery from said canal.

CONTRACT OF OCTOBER 23, 1918

ART. 16. That certain contract between the United States of America and the District, bearing date of October 23, 1918, providing for a connection with Laguna Dam, is hereby terminated, except as to the provisions of Article nine (9) thereof, and as one of the considerations for the partial termination of said contract by the United States. the District hereby promises and agrees to make full payment to the United States of all unpaid installments of charges as provided in Article nine (9) of said agreement, anything in said contract to the contrary notwithstanding. As an additional consideration for the partial termination of said contract of October 23, 1918, the District hereby promises and agrees to furnish to the United States or its successors in interest in the control, operation, and maintenance of the Yuma Project, from any power development on the All-American Canal at or near Pilot Knob. up to but not to exceed four thousand horsepower of electrical energy for use by the agency in charge of project operations for irrigation and drainage pumping purposes and necessary incidental use on said Yuma Project, such power to be furnished at cost (including overhead and general expense) plus ten per cent; provided, however, that the District shall not be required to furnish such power at or near Pilot Knob except at such times as all power feasible of development at Syphon Drop or developed elsewhere within a radius of 40 miles from the city of Yuma for the benefit of the Yuma project is being used for Project operations as in this article specified.

DELIVERY OF WATER BY UNITED STATES

ART. 17. The United States shall, from storage available in the reservoir created by Hoover Dam, deliver to the

District each year at a point in the Colorado River immediately above Imperial Dam, so much water as may be necessary to supply the District a total quantity, including all other waters diverted for use within the District from the Colorado River, in the amounts and with priorities in accordance with the recommendation of the Chief of the Division of Water Resources of the State of California, as follows (subject to availability thereof for use in California under the Colorado River Compact and the Boulder Canyon Project Act):

The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth, as follows:

SECTION 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said District as it now exists and upon lands between said District and the Colorado River, aggregating (within and without said District) a gross area of 104,500 acres, such waters as may be required by said lands.

SEC. 2. A second priority to Yuma Project of the United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.

SEC. 3. A third priority (a) to Imperial Irrigation District, and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa," adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 3,850,000 acre-feet of water per annum less the beneficial consumptive use under the prior-

ities designated in Sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in Sections 1, 2, and 3 of this article shall not exceed 3,850,000 acre-feet of water per annum.

- SEC. 4. A fourth priority to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum.
- SEC. 5. A fifth priority (e) to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum and (b) to the City of San Diego and/or County of San Diego, for beneficial consumptive use, 112,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.
- SEC. 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa," adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.
- SEC. 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on Map No. 23000 of the Department of the Interior, Bureau of Reclamation.

SEC. 8. So far as the rights of the allottees named above are concerned, the Metropolitan Water District of Southern California and/or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said District and/or said City (not exceeding at any one time 4.750,000 acre-feet in the aggregate) by reason of reduced diversions by said District and/or said City; provided, that accumulations shall be subject to such conditions as to accumulation, retention. release, and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between said District and/or said City and such users resulting therefrom.

SEC. 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and/or County of San Diego shall have the exclusive right to withdraw and divert into an aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said City and/or said County (not exceeding at any one time 250,000 acre-feet in the aggregate) by reason of reduced diversions by said City and/or said County: provided. that accumulations shall be subject to such conditions as to accumulations, retention, release, and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final: provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between the said City and/or said County and such users resulting therefrom.

SEC. 10. In no event shall the amounts allotted in this agreement to the Metropolitan Water District of Southern California and/or the City of Los Angeles be increased on account of inclusion of a supply for both said District and said City, and either or both may use said apportionments as may be agreed by and between said District and said City.

SEC. 11. In no event shall the amounts allotted in this agreement to the City of San Diego and/or to the County of San Diego be increased on account of inclusion of a supply for both said City and said County, and either or both may use said apportionments as may be agreed by and between said City and said County.

SEC. 12. The priorities hereinbefore set forth shall be in no wise affected by the relative dates of water contracts executed by the Secretary of the Interior with the various parties.

The Secretary reserves the right to, and the District agrees that he may, contract with any of the allottees above named in accordance with the above stated recommendation, or, in the event that such recommendation as to Palo Verde Irrigation District is superseded by an agreement between all the above allottees or by a final judicial determination, to contract with the Palo Verde Irrigation District in accordance with such agreement or determination; *Provided*, that priorities numbered fourth and fifth shall not thereby be disturbed.

As far as reasonable diligence will permit said water shall be delivered as ordered by the District, and as reasonably required for potable and irrigation purposes within the boundaries of the District in the Imperial and Coachella Valleys in California. This contract is for permanent water services but is subject to the condition that Hoover Dam and Boulder Canyon Reservoir shall be used: First, for river regulation, improvement of navigation, and flood

control; second, for irrigation and domestic uses and satisfaction of perfected rights in pursuance of Article VIII of the Colorado River Compact; and third, for power. This contract is made upon the express condition and with the express covenant that the District and the United States shall observe and be subject to, and controlled by said Colorado River Compact in the construction, management and operation of Hoover Dam, Imperial Dam, All-American Canal, and other works and the storage, diversion, delivery and use of water for the generation of power, irrigation, and other purposes. The United States reserves the right to temporarily discontinue or reduce the amount of water to be delivered for the purpose of investigation, inspection, maintenance, repairs, replacements or installation of equipment and/or machinery at Hoover Dam, but as far as feasible the United States will give the District reasonable notice in advance of such temporary discontinuance or reduction. The United States, its officers, agents and employees shall not be liable for damages when, for any reason whatsoever, suspension or reductions in delivery of water occur. This contract is without prejudice to any other or additional rights which the District may now have not inconsistent with the foregoing provisions of this article, or may hereafter acquire in or to the waters of the Colorado River. Nothing in this contract shall be construed to prevent the District from diverting water to the full capacity of the All-American Canal if and when water over and above the quantity apportioned to it hereunder is available, and no power development at Imperial and/or Laguna Dam shall be permitted to interfere with such diversion by the District, but, except as provided in Article twenty-one (21), water shall not be diverted, transported or carried by or through the works to be constructed hereunder for any agency other than the District, except by written consent of the Secretary.

MEASUREMENT OF WATER

ART.18. The water which the District receives under the apportionment as provided in Article seventeen (17) hereof shall be measured at such point or points on the canal as may be designated by the Secretary. Measuring and controlling devices shall be furnished and installed by the United States as a part of the work provided for herein, but shall be operated and maintained by and at the expense of the District. They shall be and remain at all times under the complete control of the United States, whose authorized representatives may at all times have access to them over the lands and rights-of-way of the District.

RECORD OF WATER DIVERTED

ART. 19. The District shall make full and complete written reports as directed by the Secretary, on forms to be supplied by the United States, of all water diverted from the Colorado River, and the disposition thereof. The records and data from which such reports are made shall be accessible to the United States on demand of the Secretary.

REFUSAL OF WATER IN CASE OF DEFAULT

ART. 20. The United States reserves the right to refuse to deliver water to the District in the event of default for a period of more than twelve (12) months in any payment due the United States under this contract, or, in the discretion of the Secretary to reduce deliveries in such proportion as the amount in default by the District bears to the total amount due. It is understood, however, that the provisions of this article shall not relieve the District of its obligation to divert, transport and deliver water for the use and benefit of the Yuma Project as herein elsewhere provided, nor shall it relieve the District of its obligation hereunder to divert, transport and deliver water for the use and benefit of other agencies with whom the United States may contract for the diversion, transportation and

delivery of water through or by the works to be constructed under the terms hereof. The United States further reserves the right to forthwith assume control of all or any part of the works to be constructed hereunder and to care for, operate and maintain the same, so long as the Secretary deems necessary or advisable, if, in his opinion, which shall be final and binding upon the parties hereto, the District does not carry out the terms and conditions of this contract to their full extent and meaning. In such event, the District's pro rata share of the actual cost of such care, operation and maintenance by the United States shall be repaid to the United States, plus fifteen per centum (15%) to cover overhead and general expense, on March first of each year immediately succeeding the calendar year during which the works to be constructed hereunder are operated and maintained by the United States. Nothing herein contained shall relieve the District of the obligation to pay in any event all installments and penalties provided in this contract.

USE OF WORKS BY THE UNITED STATES AND OTHERS

ART. 21. The United States also reserves the right to, and the District agrees that it may, at any time prior to the transfer of constructed works to the District for operation and maintenance, increase the capacity of the said works and contract for such increased capacity with other agencies for the delivery of water for use in the United States; provided, however, that such other agencies shall not thereby be entitled to participate in power development on said All-American Canal, except at points where and to the extent that the water diverted and/or carried for them contributes to the development of power. In the event other agencies thus contract with the United States, each of such agencies shall assume such proportion of the total cost of said works to be used jointly by such agency and the District, including Laguna Dam, as the Secretary may determine to be equitable and just but not less than the proportion that the capacity provided for such agency

in such works bears to the total capacity thereof (except in that part thereof above Syphon Drop including Laguna Dam, in which part the proportion which such other agency shall assume shall be not less than the proportion that the capacity provided for such agency therein bears to the total capacity thereof less the capacity to be provided hereunder without cost to and for the Yuma Project) and the District's financial obligations under this contract shall be adjusted accordingly. In no event shall construction costs chargeable to the District be increased by reason of additional capacity being provided for any such agency or agencies or contract or contracts having been made with same. Any such agency thus contracting shall also be required to reimburse the District in such amounts and at such times as the Secretary may determine to be equitable and just for payments theretofore made by the District for the right to use Laguna Dam.

TITLE TO REMAIN IN THE UNITED STATES

ART. 22. Title to the aforesaid Imperial Dam and All-American Canal to be constructed by the United States under the terms and conditions hereof, shall be and remain in the United States notwithstanding transfer of the care, operation, and maintenance thereof to the District; provided, however, that the Secretary may, in his discretion, when repayments to the United States of all moneys advanced shall have been made, transfer the title to said main canal and appurtenant structures, except the diversion dam and the main canal and appurtenant structures down to and including Syphon Drop, to the District or other agencies of the United States having a beneficial interest therein in proportion to their respective capital investments under such form or organization as may be acceptable to him.

ASSESSMENT OF PUBLIC LAND

ART. 23. The following lands are hereby designated as subject to the provisions of the act of August 11, 1916 (39

Stat. 506), and the act of May 15, 1922 (42 Stat. 541):

- (a) All unentered public lands and entered lands for which no final certificate has been issued, situate within the District at the date hereof; and when included within the District, unentered public lands and entered lands for which no final certificate has been issued, hereafter to be included within the District pursuant to this contract, all described in a statement marked "Exhibit B" attached hereto and by reference thereto made a part hereof; and
- (b) Unentered public lands and entered lands for which no final certificate has been issued not so described but hereafter annexed to the District, upon the Secretary's consenting, in the case of such lands hereafter annexed to the District, to assessment hereunder of such added lands, which consent will be requested by resolution of the Board of Directors of the District and will be manifested by letter filed with the District, a copy of such letter to be filed also with the General Land Office, and a copy with the proper local Land Office.

Within a reasonable time, to be determined by the Secretary, from the date water is available for and can be delivered to any public lands within the boundaries of the District, such lands shall be opened to entry.

RULES AND REGULATIONS

ART. 24. There is reserved to the Secretary the right to prescribe and enforce rules and regulations not inconsistent with this contract, governing the diversion and delivery of water hereunder to the District and to other contractors. Such rules and regulations may be modified, revised and/or extended from time to time after notice to the District and opportunity for it to be heard, as may be deemed proper, necessary or desirable by the Secretary to carry out the true intent and meaning of the law and of this contract, or amendments thereof, or to protect the interests of the United States. The District hereby agrees

that in the operation and maintenance of the Imperial Dam and All-American Canal, all such rules and regulations will be fully adhered to.

INSPECTION BY THE UNITED STATES

ART. 25. The Secretary may cause to be made from time to time a reasonable inspection of the works constructed by the United States under the terms hereof to the end that he may ascertain whether the terms of this contract are being satisfactorily executed by the District. The actual expense of such inspection in any calendar year, as found by the Secretary, shall be paid by the District to the United States on March first of each year immediately following the year in which such inspection is made, and upon statement to be furnished by the Secretary. The Secretary or his representative shall at all times have the right of ingress to and egress from all works of the District for the purpose of inspection, repairs, and maintenance of works of the United States, and for all other purposes.

ACCESS TO BOOKS AND RECORDS

ART. 26. The officials or designated representatives of the District shall have full and free access to the books and records of the United States, so far as they relate to the matters covered by this contract, with the right at any time during office hours to make copies of and from the same; and the Secretary shall have the same right in respect of the books and records of the District.

DISPUTES OR DISAGREEMENTS

ART. 27. Disputes or disagreements as to the interpretation or performance of the provisions of this contract, except as otherwise provided herein, shall be determined either by arbitration or court proceedings, the Secretary being authorized to act for the United States in such proceedings. Whenever a controversy arises out of this contract, and the parties hereto agree to submit the matter to arbitration, the District shall name one arbitrator and the

Secretary shall name one arbitrator, and the two arbitrators thus chosen shall elect three other arbitrators, but in the event of their failure to name all or any of the three arbitrators within thirty (30) days after their first meeting, such arbitrators not so elected, shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Ninth Circuit. The decision of any three of such arbitrators shall be a valid and binding award of the arbitrators.

INTEREST AND PENALTIES

ART. 28. No interest shall be charged on any installments of charges due from the District hereunder except that on all such installments or any part thereof, which may remain unpaid by the District to the United States after the same become due, there shall be added to the amount unpaid a penalty of one-half of one per centum ($\frac{1}{2}$ %) and a like penalty of one-half of one per centum ($\frac{1}{2}$ %) of the amount unpaid shall be added on the first day of each month thereafter so long as such default shall continue.

AGREEMENT SUBJECT TO COLORADO RIVER COMPACT

ART. 29. This contract is made upon the express condition and with the express understanding that all rights based upon this contract shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," which compact was approved by the Boulder Canyon Project Act.

APPLICATION OF RECLAMATION LAW

ART. 30. Except as provided by the Boulder Canyon Project Act, the reclamation law shall govern the construction, operation, and maintenance of the works to be constructed hereunder.

CONTRACT TO BE AUTHORIZED BY ELECTION AND CONFIRMED BY COURT

ART. 31. The execution of this contract by the District shall be authorized by the qualified electors of the District at an election held for that purpose. Thereafter, without delay, the District shall prosecute to judgment proceedings in court for a judicial confirmation of the authorization and validity of this contract. The United States shall not be in any manner bound under the terms and conditions of this contract unless and until a confirmatory final judgment in such proceedings shall have been rendered, including final decision, or pending appellate action if ground for appeal be laid. The District shall without delay and at its own cost and expense furnish the United States for its files, copies of all proceedings relating to the election upon this contract and the confirmation proceedings in connection therewith, which said copies shall be properly certified by the Clerk of the Court in which confirmatory judgment is obtained.

METHOD OF DETERMINING NET POWER PROCEEDS

ART. 32. In determining the net proceeds for each calendar year from any power development on the All-American Canal, to be paid into the Colorado River Dam Fund as provided in Article fourteen (14) hereof, there shall be taken into consideration all items of cost of production of power, including but not necessarily limited to amortization of and interest on capital investment in power development, replacements, improvements, and operation and maintenance, if any. Any other proper factor of cost not here expressly enumerated may be taken into account in determining the net proceeds.

CONTINGENT UPON APPROPRIATIONS

ART. 33. This contract is subject to appropriations being made by Congress from year to year of moneys sufficient to do the work provided for herein, and to there being sufficient moneys available in the Colorado River Dam Fund to permit allotments to be made for the performance of such work. No liability shall accrue against the United States, its officers, agents or employees, by reason of sufficient moneys not being so appropriated nor on account of there not being sufficient moneys in the Colorado River Dam Fund to permit of said allotments. If more than three years elapse after this contract becomes effective and before appropriations are available to permit the United States to make expenditures hereunder, the District may. at its option, upon giving sixty (60) days' written notice to the Secretary, cancel this contract. Such option shall be expressed by vote of the electors of the District with the same formalities as required for the authorization of contracts with the United States.

INCLUSION OF LANDS

ART. 34. (a) In this article where the words "area to be included" are used such words shall be understood to mean those certain areas shown on Exhibit A and bounded by the lines indicated thereon as "Boundary of Additional Areas in Proposed Enlarged Imperial Irrigation District."

- (b) The District agrees to change its boundaries within a reasonable time after the execution of this contract, in the manner provided by law, so as to include within the District the public lands of the United States in Imperial County lying south of the northerly boundary line of Township eleven (11) South of the San Bernardino Base Line, and within the area to be included.
- (c) The District further agrees to change its boundaries, if lawful petition or petitions therefor be presented to its

Board of Directors prior to the first day of January 1940, so as to include within the District any privately owned and/or entered lands for which final certificate has not been issued, in Imperial County, lying south of the northerly boundary line of Township eleven (11) South of the San Bernardino Base Line, and within the area to be included.

- (d) The District further agrees to change its boundaries. in the manner provided by law, so as to include within the District the lands lying north of the northerly boundary line of Township eleven (11) South of the San Bernardino Base Line, and within the area to be included, if lawful petition or petitions sufficient in all respects for such inclusion be presented to its Board of Directors at any time prior to the expiration of thirty days from and after the date on which a confirmatory judgment, as required by Article 31 hereof, declaring this contract in all respects valid and duly authorized, shall have become final; provided, however, that the District shall not change its boundaries so as to include any of said lands lying north of the northerly boundary line of said Township eleven (11) South, unless the said petition or petitions so filed shall be sufficient to lawfully include in the aggregate not less than ninety per centum (90%) (the areas to be approved by the Secretary) of the said lands, exclusive of the Dos Palmas area and exclusive of Indian lands and public lands of the United States. Within a reasonable time after the inclusion of such lands pursuant to said petition or petitions the District further agrees to change its boundaries, in the manner provided by law, so as to also include within the District the public lands of the United States within the area to be included and lying north of the northerly boundary line of said Township eleven (11) South.
- (e) Whenever any of the lands within the area to be included are included within the District the inclusion thereof shall be made upon conditions substantially as hereinafter contained (filling blank spaces with appropriate unit names as may be required and other proper designa-

tions), and the Secretary, on behalf of the United States, hereby consents to such inclusion and conditions, which conditions are as follows:

CONDITION No. 1

DEFINITIONS

In the following conditions, the word "District" shall mean Imperial Irrigation District; the word "Board" shall mean the Board of Directors of Imperial Irrigation District; the words "All-American Canal Contract" shall mean that certain contract between the United States of America by Ray Lyman Wilbur, Secretary of the Interior, and Imperial Irrigation District, dated,
(date of this contract)
and entitled "Contract for construction of diversion dam, main canal and appurtenant structures and for Delivery of Water," authorized by the electors of Imperial Irrigation District at an election held;
(date of this contract authorized)
and the words "distribution system" shall mean the secondary main canal and lateral system or systems, including all canals, pipe lines, structures, pumping plants, machinery and incidental works necessary or convenient under the rules and regulations of Imperial Irrigation District for delivery of water for irrigation and domestic purposes from the All-American Canal, as the same is shown on Exhibit "A" attached to and made a part of said All-American Canal Contract, to lands in

CONDITION No. 2 **DIVISION INTO UNITS**

Unit as such unit is hereinafter defined.

For the purposes of these conditions and in compliance with the terms of the All-American Canal Contract, the

201a
District shall be divided into units, commencing with Imperial Unit, which unit shall comprise the lands within the District as of July 1, 1931, and such other lands as may at any time or from time to time be added thereto in the discretion of the Board.
(name)
(here shall follow description or other designation of the unit involved as provided by Article 10 (c) of the All-American Canal Contract)
CONDITION NO. 3
ALL-AMERICAN CANAL CONTRACT
The Lands within Unit shall be, in
all respects, bound by all of the terms and conditions of
the All-American Canal Contract and particularly by Ar-
ticle 10 thereof, and shall pay, as a unit obligation, the
several amounts and in the manner and at the times pro-
vided for in said contract, as the Board may determine:
provided, that said lands in Unit shall
pay to the District, as a unit obligation, that proportion
of the total aum maid but he District to the United States

pay to the District, as a unit obligation, that proportion of the total sum paid by the District to the United States under that certain contract of October 23, 1918, between the United States and the District for the right to connect with Laguna Dam, prior to the payment of the first installment on said contract of October 23, 1918, for which said land shall be assessed, that the total area of Unit bears to the total area of the

District at the date notice of completion of all work provided for in the All-American Canal Contract shall be given, pursuant to Article 12 thereof, to the District. Said sum shall be divided into ten annual installments, as nearly equal as may be practicable, and paid, commencing with the calendar year next succeeding the calendar year when such notice of completion shall be so given.

CONDITION NO. 4 DISTRIBUTION SYSTEM

The Lands within Unit shall
pay, as a unit obligation, the total capital cost of any distribution system which may be constructed by or under authority of the District, to serve the lands within said Unit or any part thereof. When
said distribution system, or any part thereof, is constructed, or an obligation therefor is incurred, said lands shall pay annually, such sum or sums as may be necessary to meet the then current obligation therefor, whether for principal or interest or both, or otherwise. Said distribution system shall at all times be and remain the exclusive property of the District unless the District shall provide otherwise, in the discretion of the Board. When funds for the construction of said distribution system are made available, the District shall construct or authorize the same to be constructed, as the Board may determine.
CONDITION NO. 5
PUMPING COSTS
The Board shall provide by rule for the payment by the lands served of the cost of power required to pump water to or for the use of such lands.
CONDITION NO. 6
CHARGES TO BE PART OF ASSESSMENT
Any and all charges against or upon the lands with- in Unit provided for by the foregoing conditions unless otherwise collected from the lands
within Unit shall be a part of, but in

addition to, the annual assessment upon the said lands for other District purposes and payable in installments accordingly, and shall constitute an additional annual charge upon the land, and the Board shall levy such assessment upon the said lands upon an ad valorem or other basis as now or hereafter provided by law, in an amount or in amounts sufficient to raise the several sums provided for from the said lands within (name) provided, that for the protection of the interests and security of the United States, pending completion of construction of the All-American Canal to such extent that available in said water canal Unit. the annual assessment (name) upon the lands within said unit for District purposes shall be limited to raise only the just proportion chargeable to said unit for expenditures connected with or applying to the All-American Canal and/or arising from expenditures made in or on behalf of said unit.

(f) In the event petition or petitions for inclusion, pursuant to this article, of any privately owned lands or entered lands for which no final certificate has at the time been issued, lying south of the northerly boundary line of Township eleven (11) South of the San Bernardino Base Line, and within the area to be included, be presented subsequent to the expiration of thirty days from and after the date on which a confirmatory judgment, as required by Article 31 hereof, declaring this contract in all respects valid and duly authorized, shall have become final, then the District may in the discretion of the Board of Directors require as a condition precedent to the granting of said petition or petitions and in addition to the other conditions above named, that the petitioners shall pay to the District such respective sums as nearly as the same can be estimated (the amounts to be determined by the Board) as the holders of title or evidence of title to the several parcels of land involved in said petition or petitions and their grantors would have been required to pay to the District as assessments had such lands been included within the District at the expiration of said 30-day period, or such portion of said sum as the Board of Directors may at the time determine. The provisions of this sub-article shall also apply to all lands lying north of the northerly boundary line of said Township eleven (11) South, and within the area to be included, provided the ninety per centum (90%) petition required by sub-article (d) of this article is filed prior to the expiration of said 30-day period.

- (g) In the event that petition or petitions for inclusion of the said lands lying north of the northerly boundary line of said Township eleven (11) South of the San Bernardino Base Line, as in sub-article (d) above provided are not made and filed with the Board of Directors of the District prior to the expiration of thirty days from and after the date on which a confirmatory judgment, as required by Article 31 hereof, declaring this contract in all respects valid and duly authorized, shall have become final, as hereinabove provided, then said lands shall not thereafter be included within the District under the provisions of this contract and the works referred to in this contract north of the northerly boundary line of said Township eleven (11) South of the San Bernardino Base Line shall not be constructed under this contract and the District shall be relieved from all responsibility therefor, anything in this contract to the contrary notwithstanding, and the capacities in the works to be constructed under this contract. shall be reduced accordingly.
- (h) Northing contained in this contract shall impair any right or remedy of any person entitled to object or protest against the inclusion within the District of any particular tract or tracts of land, or the conditions imposed by the Board of Directors of the District on the inclusion of any particular tract or tracts, nor impair the power of the Board to hear and determine any such objections or pro-

tests, but if in the opinion of the Secretary such determination by the Board substantially impairs the interests of, or security otherwise available to, the United States under this contract, then and in such event the United States shall be under no obligation to proceed further under this contract. In the event any petition or petitions be filed for the inclusion within the District of any lands within the area to be included and, after the conditions set out in subarticle (e) of this article, or conditions less burdensome, are imposed thereon, a sufficient majority statement or statements in writing be filed objecting to the inclusion of such lands with the conditions imposed thereon, so that the Board of Directors is required to dismiss such petition or petitions, then it shall be regarded as if such petition or petitions had not been filed.

PRIORITY OF CLAIMS OF THE UNITED STATES

ART. 35. Claims of the United States arising out of this contract shall have priority over all others, secured and unsecured.

RIGHTS RESERVED UNDER SECTION 3737 REVISED STATUTES

ART. 36. All rights of action for breach of any of the provisions of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States.

REMEDIES UNDER CONTRACT NOT EXCLUSIVE

ART. 37. Nothing contained in this contract shall be construed as in any manner abridging, limiting or depriving the United States or the District of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have. The waiver of a breach of any of the provisions of this contract shall not be deemed to be a waiver of any other provision hereof or of a subsequent breach of such provision.

INTEREST IN CONTRACT NOT TRANSFERABLE

ART. 38. No interest in this contract is transferable by the District to any other party, and any such attempted transfer shall cause this contract to become subject to annulment at the option of the United States.

MEMBER OF CONGRESS CLAUSE

ART. 39. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

In witness whereof the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA, By RAY LYMAN WILBUR, Secretary of the Interior.

Attest:

NORTHCUTT ELY. ELWOOD MEAD. IMPERIAL IRRIGATION DISTRICT, By JOHN L. DUBOIS,

President.

Attest: [SEAL]

F. H. MCIVER, Secretary.

EXHIBIT B

UNENTERED PUBLIC LANDS AND ENTERED LANDS FOR WHICH NO FINAL CERTIFICATE HAS BEEN ISSUED

(Omitted because of limitations of space. Comprises legal descriptions of lands of these categories shown on map, Exhibit A, annexed.)

APPENDIX Q

THE SECRETARY OF THE INTERIOR Washington

February 24, 1933

Imperial Irrigation District, El Centro, California

Gentlemen:

Information at hand indicates that in connection with the contract with your district signed by me on behalf of the United States under date of December 1, 1932, some question has been raised concerning the maximum area of land in single ownership that may be irrigated from the proposed All-American Canal. My attention has been specifically called to the suit now pending in the Superior Court of Imperial County, California entitled Malan v. Imperial Irrigation District et al. Among other things the complaint in this case contains the following allegation:

"And it is further provided by the reclamation law of the United States that water shall not be delivered from any canal so constructed by the Secretary of the Interior under the said reclamation law to any landowner owning more than 160 acres of land."

The foregoing is an inaccurate statement of the reclamation law in this respect. Presumably this allegation is intended to refer to section 5 of the reclamation act of June 17, 1902, which reads in part as follows:

"No right to the use of water for land in private ownership shall be *sold* for a tract exceeding 160 acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bone fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made." (Emphasis supplied).

It will be noted that while the reclamation law provides that no water shall be *sold* for a tract of land in excess of

160 acres in single ownership, it does not provide, as alleged, that no water shall be delivered from a canal constructed by the Government to any tract exceeding 160 acres in area. The All-American Canal contract with the Imperial Irrigation District does not provide for the sale of storage water for use in the Imperial and Coachella Valleys. The contract, in article 17, provides merely for the delivery of water for use in these valleys through the works to be constructed by the United States. No charge whatever is made for the water so to be delivered, and under the provisions of the Boulder Canyon Project Act no such charge can legally be made. From section 1 of this act for convenient reference the following is quoted:

"Provided, however, that no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys."

Early in the negotiations connected with the All-American Canal contract, the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this canal. Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right. These lands, having already a water right, are entitled to have such vested right recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas.

In connection with the activities of the Bureau of Reclamation it has been held that the provisions of section 5 of the reclamation act restricting the sale of a right to use water for land in private ownership to not more than 160 acres will not prevent the recognition of a vested water

right for a larger area, and protection of the same by allowing the continued flowage of the water covered by the right through the works constructed by the Government. (Opinion of Assistant Attorney General, 34 L.D. 351; Anna M. Wright, 40 L.D. 116).

On many projects it has been the practice to recognize vested rights in single ownership in excess of 160 acres and to deliver the water necessary to satisfy such rights through works constructed by and at the expense of the Government. This is true of the Newlands project, the North Platte project, the Umatilla project, and others.

The provision quoted from section 5 of the reclamation act relates to land in private ownership. This of course would not apply to the tributary public lands to be included within the boundaries of the district. While this particular provision would not be applicable to the public lands, they would be governed by section 4 of the reclamation act and other provisions which limit the area of public lands, that may be entered to a farm unit required for the support of a family. This area will be such as may be fixed by the Secretary, consisting of not less than 10 nor more than 160 acres. (Section 9 of the Boulder Canyon Act and Act of June 27, 1906, 34 Stat. 519).

The foregoing has been long settled by decisions of the Department and by the practice in carrying such decisions into effect.

Sincerely yours, /s/ RAY LYMAN WILBUR, Secretary

APPENDIX R

Regulations appearing at 38 L.D. 637 (1910) provide:

VESTED WATER RIGHTS.

45. The provision of section 5 of the reclamation act limiting the area for which the use of water may be sold does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through the works constructed by the Government under appropriate regulations and charges.

Similarly, regulations appearing at 43 C.F.R. § 230.70 provide:

Vested Water Rights

§230.70. Recognition of vested rights to water. The provision of section 5 of the act of June 17, 1902 (32 Stat. 389; 43 U.S.C. 381, 392, 431, 439), limiting the area for which the use of water may be sold, does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through the works constructed by the Government under appropriate regulations and charges.

APPENDIX S

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation [43 CFR Part 426] ACREAGE LIMITATION Reclamation Rules and Regulations

AGENCY: Bureau of Reclamation, Interior

ACTION: Proposed rule

SUMMARY: The Bureau of Reclamation, Department of the Interior, proposes to issue rules and regulations establishing policies and procedures to meet the Secretary's responsibilities in administering the acreage limitation and other provisions of reclamation law. These proposed rules are issued in response to the order of the United States District Court for the District of Columbia in the case of National Land for People, Inc. v. The Bureau of Reclamation, et al., Civil Action No. 76-928. The Department believes that these new regulations will enable the Department to meet fully the mandates of reclamation law.

DATES: Comment Period: November 23, 1977.

ADDRESS: Comments should be submitted to the Commissioner, Bureau of Reclamation, Department of the Interior, 18th and C Streets NW., Washington, D.C. 20240, Attention: Code 410.

FOR FURTHER INFORMATION CONTACT:

Mr. Vernon S. Cooper, Special Projects Officer, Division of Water and Land, Bureau of Reclamation (202) 343-5104.

SUPPLEMENTAL INFORMATION: It is the policy of the Department of the Interior to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments, suggestions, or objections regarding the proposed regulations to the Bureau of Reclamation. Comments must be received on or before November 23, 1977. Public hearings on the proposed regulations will be scheduled as demand warrants. The Department requests that those interested in public hearings immediately notify in writing the Commissioner of the Bureau of Reclamation or the nearest Bureau of Reclamation office with suggestions for hearing places. The hearings will then be scheduled, and the public notified, in a later edition of the FEDERAL REGISTER.

On August 13, 1976, the United States District Court for the District of Columbia in the case of "National Land for People, Inc. v. The Bureau of Reclamation, et al.," Civil Action No. 76-928, ordered the Department of the Interior to "forthwith initiate public rulemaking proceedings * * respecting the criteria and procedures to be used by the Bureau of Reclamation, Department of the Interior, to approve 'excess lands' sales under the Federal Reclamation Laws." These proposed rules are in response to this court order.

The proposed regulations embody several important changes in current practices to enforce the excess land (160 acre limitation) and other reclamation laws. They define more specifically the procedures by which excess lands should be sold and who can qualify as purchasers, to fulfill the purpose of reclamation law that low-priced federal water be used as a means of encouraging the establishment of genuine small family farms. The principal changes are as follows:

(1) All new purchasers of excess land benefiting from low-priced federal water must live on or in the neighborhood of the land benefited. Because the regulations address only excess lands, they do not make residency a general requirement for any land served with low-cost federal water pursuant to the reclamation laws. Residency is, however, believed to be a legally required condition of

receiving federally-subsidized water, and regulations spelling out how the residency requirement will be reimplemented across-the-board will be prepared as soon as practicable. These rules will outline the procedure by which those landowners who now benefit from low-cost federal water, but who do not live on or in the neighborhood of their land, will be allowed a period of time to bring themselves into compliance while still receiving the low-cost federal water. Such a period of adjustment is deemed appropriate because of the failure to enforce the requirement for many years.

- (2) The criteria for determining qualified purchasers of excess land are tightened, to prohibit multiple ownerships (such as partnerships or trusts) except where there is a family relationship among the owners.
- (3) The regulations discourage speculation by allowing the Department to exercise continuing supervision over the sale price of land after it is sold into non-excess status. This reverses the current practice of allowing an excess land purchaser to realize the windfall profits represented by low-priced federal water in an immediate resale.
- (4) The proposed regulations place some limitations on the leasing of both excess and nonexcess lands benefited by low-priced federal water, in order to promote farm operations by the actual owners.
- (5) The regulations alter the procedures by which excess lands are sold, to allow a large number of prospective purchasers a better opportunity to participate in the reclamation program. For example, the past practice of allowing an excess land seller to arrange privately for sale is abolished. The Department will announce the availability of such lands, and choose among prospective purchasers by lottery or other impartial means.

In connection with these proposed regulations, it should be noted that, pursuant to Pub. L. 95-46, the Department has created a Task Force to study the San Luis Unit of the Central Valley Project in California. The Task Force's report, due January 1, 1978, will include among the other things a study of the excess land law's operation in that area, and may make recommendations to the Department and to the Congress regarding the excess land and residency portions of the reclamation law.

The Department intends to act promptly to promulgate final regulations once public comment has been received and digested and appropriate modifications made. On June 27, 1977, the Secretary ordered a halt to the processing of all excess land sales and the signing of new recordable contracts until final regulations are promulgated, and the Department is also under a court order to promulgate such regulations "forthwith." Therefore, the Department intends to proceed as expeditiously as possible once full opportunity for public comment has been given. For this reason, the Department does not expect to grant any extensions beyond the already generous 90-day comment period.

The primary authors of this document are: John D. Leshy, Associate Solicitor, Energy and Resources, Washington, D.C. (202) 343-5757; John C. McDowell, Deputy Associate Solicitor, Energy and Resources, Washington, D.C. (202) 343-4325; Nicholas P. Goschy, Attorney, Energy and Resources, Washington, D.C. (202) 343-4444; Vernon S. Cooper, Special Projects Officer, Division of Water and Land, Washington, D.C. (202) 343-5104; and Michael S. Hacskaylo, Realty Specialist (Excess Land), Division of Water and Land, Washington, D.C. (202) 343-5104.

It is hereby determined that the publication of this proposed regulation will not significantly affect the quality of the human environment and that no environment impact statement pursuant to section 102(2) (c) of the National

Environmental Policy Act, 42 U.S.C. Section 4332(c) is required.

NOTE: The Department of the Interior has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821 as amended by Executive Order 11949 and OMB Circular A-107.

Dated: August 22, 1977.

GUY R. MARTIN.

Assistant Secretary of the Interior.

Pursuant to the authority of the Secretary of the Interior contained in the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 552, 553 and in the Reclamation Act of 1902, as amended and supplemented, 32 Stat. 388, 43 U.S.C. 371 et seq., it is hereby proposed to establish a new Part 426 of Title 43 to read as follows:

PART 426—RECLAMATION RULES AND REGULA-TIONS FOR ACREAGE LIMITATION

Sec.

426.1 Objectives.

426.2 Effective date, applicability.

426.3 Authority.

426.3 Authority.
426.4 Definitions.
426.5 Deliveries of project water to excess land under special circumstances.
426.6 Lands not eligible to receive project benefits.
426.7 Types of land ownership.
426.8 Leases.

426.9 Nonexcess land.

426.10 Disposition of excess lands.

426.11 Commingling.

426.12 Appraisals of excess land.

426.13 Class 1 equivalency.

426.14 Decisions and appeals.

AUTHORITY: Administrative Procedure Act, 60 Stat. 237, (5 U.S.C. 552, 553), Reclamation Act of 1902, as amended and supplemented, 32 U.S.C. 371, et seq.

§ 426.1 Objectives.

The Reclamation Act policies of limiting the area of land for which project water may be supplied and requiring the landowner to reside on or in the neighborhood of the land benefited are designed:

- (a) To provide opportunity for a maximum number of farmers on the land.
- (b) To distribute widely the benefits from public-supported reclamation because interest-free money and lowpriced water are involved.
 - (c) To promote the family-size owner-operated farm.
- (d) To preclude the accrual of speculative gain in the disposition of excess land.

§ 426.2 Effective date, applicability.

- (a) These regulations shall become effective upon publication in the FEDERAL REGISTER as final rulemaking.
- (b) These regulations apply to all existing excess lands, including those now under recordable contract. Among other things, they define, consistent with but with greater specificity than existing recordable contracts, both those persons qualified to purchase excess lands (as provided in standard recordable contracts) and those procedures to be used in disposing of excess lands. These regulations shall not apply to existing repayment, water service and recordable contracts only to the extent there is a clear, specific and irreconcilable conflict between these regulations and existing valid contracts which are not otherwise inconsistent with the reclamation laws.
- (c) Persons who own lands (1) served by more than one Federal project subject to reclamation laws or (2) located in more than one district, the total of which exceeds the acreage limitation, shall have one year from the effective date of these regulations to sign a recordable contract for the sale of excess lands, in order not to interrupt delivery of Federal water to these lands.

§ 426.3 Authority.

These regulations are promulgated pursuant to authority vested in the Secretary by Congress in the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 552, 553, and the Reclamation Act of 1902, as amended and supplemented, 32 Stat. 388, 43 U.S.C. 371 et seq. The basic requirement that the Bureau of Reclamation limit the sale of water rights or the delivery of project water to tracts of not more than 160 irrigable acres was initially contained in the Reclamation Act of June 17, 1902, and is, with comparatively few express statutory modifications or exceptions for particular projects, applicable to all reclamation-served lands. The acts pertinent to that basic requirement, as well as to the modifications, waivers, or exemptions, are identified in the following paragraphs.

- (a) Statutory Requirements for Excess Lands. (1) Section 5, Act of June 17, 1902 (32 Stat. 389, 43 U.S.C. 392, 431, 439).
- (2) Act of February 21, 1911 (36 Stat. 925, 43 U.S.C. 523).
- (3) Section 46, Act of May 25, 1926 (44 Stat. 649, 43 U.S.C. 423e).
- (b) Exceptions and modifications—(1) Exempt from acreage limitation. (i) Colorado-Big Thompson Project, Colorado, Act of June 16, 1938 (52 Stat. 764, 43 U.S.C. 386).
- (ii) Truckee Storage and Humboldt Projects, Nevada, Act of November 29, 1940 (54 Stat. 1219).
- (iii) Owl Creek Unit, Missouri River Basin Project, Act of August 28, 1954 (68 Stat. 890).
- (iv) Santa Maria Project, California, Act of September 3, 1954 (68 Stat. 1190).
 - (v) Beaverhead Valley, Montana, East Bench Unit, Mis-

souri River Basin Project, Act of July 24, 1957 (71 Stat. 309).

- (vi) San Felipe Division, Central Valley Project, California (North and South Santa Clara Subareas only), Section 5, Act of August 27, 1967 (81 Stat. 173, 43 U.S.C. 616fff-5).
- (vii) Narrows Units, Missouri River Basin Project, Colorado, Act of August 28, 1970 (84 Stat. 830).
- (2) Modifications of acreage limitation. (i) Projects constructed pursuant to the Water Conservation and Utilization Act of August 11, 1939 (53 Stat. 1418, 16 U.S.C. 5902(2), as amended by the Act of October 14, 1940 (54 Stat. 1121).
- (ii) San Luis Valley Project, Colorado, Act of June 27, 1952 (66 Stat. 282).
- (iii) Nonexcess holding set at 480 irrigable acres, Kendrick Project, Wyoming, Act of September 4, 1957 (71 Stat. 608).
- (c) Acreage equivalency—(1) Land equivalent to 120 acres of Class 1 land. (i) Baker Project (Upper Division), Oregon, Act of September 27, 1962 (76 Stat. 634, 43 U.S.C. 616u).
- (2) Land equivalent to 130 acres of Class 1 land. (i) East Bench Unit (bench lands only), Missouri River Basin Project, Montana, Act of July 24, 1957 (71 Stat. 309).
- (3) Land equivalent to 160 acres of Class 1 land. (i) Seedskadee Project, Wyoming, Act of August 28, 1958 (72 Stat. 963).
- (ii) Savory-Pot Hook Project, Colorado-Wyoming, Act of September 2, 1964 (78 Stat. 852, 43 U.S.C. 616jj).
- (iii) Bostwick Park Project, Colorado, Act of September 2, 1964 (78 Stat. 852, 43 U.S.C. 616jj).

- (iv) Fruitland Mesa Project, Colorado, Act of September 2, 1964 (78 Stat. 852, 43 U.S.C. 616jj).
- (v) Animas-La Plata Project, Colorado-New Mexico, Act of September 30, 1968 (82 Stat. 885).
- (vi) Dolores Project, Colorado, Act of September 30, 1968 (82 Stat. 885).
- (vii) Dallas Creek Project, Colorado, Act of September 30, 1968 (82 Stat. 885).
- (viii) San Miguel Project, Colorado, Act of September 30, 1968 (82 Stat. 885).
- (ix) West Divide Project, Colorado, Act of September 30, 1968 (82 Stat. 885).
- (x) Riverton Extension Unit, Missouri River Basin Project, Wyoming, Act of September 25, 1970 (84 Stat. 861).
- (xi) Polecat Bench Project, Wyoming, Act of March 11, 1976 (90 Stat. 205, 43 U.S.C. 615kkkk).
- (xii) Pollock-Herried Project, South Dakota, Act of March 11, 1976 (90 Stat. 208, 43 U.S.C. 6151111).
- (xiii) Kanapolis Unit, Pick-Sloan Missouri Basin Project, Kansas, Act of September 28, 1976 (90 Stat. 1324).
- (xiv) Oroville-Tonasket Unit Extension, Chief Joseph Dam Project, Washington, Act of September 28, 1976 (90 Stat. 1325).
- (xv) Uintah Unit, Central Utah Project, Utah, Act of September 28, 1976 (90 Stat. 1327).
- (xvi) Allen Camp Unit, Central Valley Project, California, Act of September 28, 1976 (90 Stat. 1328).
- (d) Use of interest payment for excess lands. (1) Washoe Project, California-Nevada, Act of August 1, 1956 (70 Stat. 775, 43 U.S.C. 614).

- (2) Small Reclamation Projects, Act of August 6, 1956 (70 Stat. 1044, 43 U.S.C. 422a-1), as amended.
- (3) Mercedes Division, Lower Rio Grande Rehabilitation Project, Texas, Act of April 7, 1958 (72 Stat. 82).
- (4) La Feria Division, Lower Rio Grande Rehabilitiation Project, Texas, Act of September 22, 1959 (73 Stat. 641).
- (e) Delivery of project water to certain categories of excess lands. (1) Involuntary acquisition of excess land
- (i) Act of July 11, 1956 (70 Stat. 524, 43 U.S.C. 423e, 544).
 - (2) Surviving Spouse
- (i) Act of September 2, 1860 (74 Stat. 732, 43 U.S.C. 423h).
- (3) Columbia Basin Project, Washington, Act of October 1, 1962 (76 Stat. 678, 16 U.S.C. 835-1, 835c).
- (4) States, their political subdivisions and agencies thereof, Act of July 7, 1970 (84 Stat. 411, 43 U.S.C. 425).
- (5) Naval Air Station, Lemoore, California, Act of August 10, 1972 (86 Stat. 531).
- (f) Excess Land Provisions Modified by Acts of Congress Authorizing Execution of Specific Contracts Negotiated Pursuant to Section 7 of the Reclamation Project Act of 1939 (53 Stat. 1187, 43 U.S.C. 485f). (1) Kittitas Reclamation District, Kittitas Division, Yakima Project, Washington, Act of May 6, 1949 (63 Stat. 64).
- (2) Prosser Irrigation District, Yakima Project, Washington, Act of October 27, 1949 (63 Stat. 943).
- (3) Roza Irrigation District, Yakima Project, Washington, Act of June 30, 1954 (68 Stat. 359).
- (4) Vale Oregon Irrigation District, Vale Project, Oregon, Act of October 27, 1949 (63 Stat. 943).

- (5) Frenchtown Irrigation District, Frenchtown Project, Montana, Act of June 23, 1952 (66 Stat. 153).
- (6) Owyhee Irrigation District, Gem Irrigation District, Ridgeview Irrigation District, Advancement Irrigation District, Payette-Oregon Slope Irrigation District, Crystal Irrigation District, Bench Irrigation District, and Slide Irrigation District, Owyhee Project, Idaho-Oregon, Act of June 23, 1952 (66 Stat. 152).
- (7) Gering and Ft. Laramie Irrigation District, Goshen Irrigation District, and Pathfinder Irrigation District, North Platte Project, Nebraska-Wyoming, Act of July 17, 1952 (66 Stat. 754).
- (8) Hermiston Irrigation District and West Extension Irrigation District, Umatilla Project, Oregon, Act of June 18, 1954 (68 Stat. 254).
- (9) North Unit Irrigation District, Deschutes Project, Oregon, Act of August 10, 1954 (62 Stat. 679).
- (10) American Falls Reservoir District No. 2, Minidoka Project, Idaho, Act of August 21, 1954 (68 Stat. 762).
- (11) Black Canyon Irrigation District, Boise Project, Idaho, Act of August 24, 1954 (68 Stat. 794).
- (12) Tulelake Irrigation District, Klamath Project, California-Oregon, Act of August 1, 1956 (70 Stat. 799).

§ 426.4 Definitions.

(a) Irrigable lands, the area to which acreage limitations are applicable, is the net acreage possessing irrigated crop production potential, after excluding areas that are occupied by and currently used for homesites, farmstead buildings, and corollary permanent structures such as feed lots, equipment storage yards, and similar facilities, together with dedicated roads open for general unrestricted use by the public. Areas used for field roads, farm ditches and

drains, tail water ponds, temporary equipment storage, and other uses dependent on operational requirements necessary to produce a specific crop, and subject to change at will, are included in the net irrigable acreage.

- (b) Nonexcess land is irrigable land beneficially held by one landowner that does not exceed the acreage permitted by statute. Unless otherwise authorized by statute, nonexcess land is 160 irrigable acres in the beneficial ownership of one individual or entity, or 320 acres owned jointly by husband and wife.
- (c) Designated nonexcess is the land of an excess landowner which has been selected to be eligible to receive project water as his nonexcess land.
- (d) Excess land is irrigable land served with water from any federal project under reclamation laws, exclusive of exempt acreage, beneficially held by one landowner which exceeds the statutory limit of acreage; i.e., which is in excess of that acreage which is nonexcess.
- (e) Exempt land is that area of privately owned irrigable land to which the acreage limitation provisions do not apply. Exempt status may be based on the following: (1) Statutory exemptions. (i) Projects are listed in § 426.3(b)(1). (ii) Contracts in § 426.3(f) provide exemption when construction charges are fully paid out. (2) Exemptions based on determination by the Secretary, upon payout of construction charges, that a general pattern of family-size ownership has developed (Sol. Op. M-36634, 68 I.D. 372, 400-401, Note 73 (1961)).
- (f) Secretary or contracting officer shall mean the Secretary of the Interior or his duly authorized representative.
- (g) District shall mean any entity which has contracted with the United States for a water supply.
 - (h) Family relationships are persons in a direct lineal

descendant relationship (natural or adopted), and their spouses.

- (i) Date of initial availability of water shall mean the date that project water becomes available to an irrigation block as determined by the Secretary.
- (j) A resident owner is a landowner who has his or her principal place of residence either on land receiving water from a Federal project governed by reclamation law, or in the neighborhood of land receiving water from such a project, as determined by the Secretary.
- (k) Neighborhood of the land is an area comprised of a maximum 50-mile radius from the particular tract of land receiving water from a Federal project governed by reclamation law. The Secretary may reduce the maximum radius, depending upon local conditions, where he determines that such reduction is appropriate to encourage family farming and the landowner's occupancy of the land benefited by the project.
- (l) Eligible nonexcess owner is an individual who (1) has his or her principal place of residence on or in the neighborhood of the land or who has under oath stated his or her intent to establish such principal place of residence within three years of acquisition of the land; (2) will not, after the acquisition, be the owner of more than 160 acres of land which receives water from any Federal project governed by reclamation law; and (3) has met all other requirements of reclamation law and these rules.
- (m) Project water is water that is furnished by or through Federally financed facilities to a District pursuant to a water service or repayment contract with the United States.
- (n) Nonproject water is water from any other source to which the District has an appropriative right.

- (o) Commingled water is that water comprising project and nonproject water delivered by or through a nonfederally constructed facility. If project and nonproject water is delivered by or through federally financed facilities, the nonproject water shall be considered project water and the acreage limitation and other requirements of Reclamation law shall apply to the users of such water.
- (p) Class I equivalency for purposes of applying the class 1 equivalency in determining nonexcess acreage entitlement on those projects for which class 1 equivalency has been authorized, class 1 irrigable land is that arable land which, under a plan of essentially full water supply has the physical capability necessary for sustained long-term irrigation production; and, on the basis of both physical and economic land classification criteria applicable within the climatic limitations of each project, is determined by the Secretary of the Interior to have adequate income potential to support a family and pay water charges when irrigated in farm units of 160 acres or less.
- (q) Beneficial owner of land is the entity deriving the benefit of ownership irrespective of the owner of record.
- (r) A recordable contract is a document wherein the landowner agrees to sell his designated excess lands upon terms and conditions satisfactory to the Secretary and at prices not to exceed those fixed by the Secretary in order to receive project water for those excess lands. The contract must be recorded in the land records of the county in which the land is situated.

§ 426.5 Deliveries of project water to excess land under special circumstances.

The following circumstances permit delivery of water to excess land.

(a) Recordable contract.—(1) Excess land may receive project water only if the owner, under terms and conditions

satisfactory to the Secretary, executes a valid recordable contract for the sale of that land to a nonexcess owner. The sale price must not reflect value that can be attributed to the construction of the project. No excess land may become eligible to receive water by the execution of a recordable contract unless such excess land was, on the date of initial availability of water to the district, owned by the landowner requesting execution of the recordable contract. In cases where project water is made available to land through temporary diversion facilities provided by the landowner, the Secretary may establish the date of initial availability of water for that land at the date of such temporary diversion.

(2) Recordable contracts shall provide that: (i) The landowner shall dispose of his excess land at an approved price to an eligible nonexcess owner within 5 years, except that the disposition period of existing recordable contracts or specified in existing water service or repayment contracts shall remain unchanged. Unless otherwise specified in a district contract entered into prior to the promulgation of these regulations, the recordable contract period shall begin at the date of initial availability of water. (ii) If the disposition of the land is not completed by the end of the required period, irrevocable power of attorney vests in the Secretary as attorney in fact for the landowner to sell the lands under such conditions as are deemed suitable by the Secretary. (iii) Prior to maturity of a recordable contract, excess land may, with approval of the contracting officer, be withdrawn from contract coverage and redesignated nonexcess: Provided, That an equal acreage of land theretofore designated nonexcess is substituted and becomes subject to all the terms of the recordable contract as though it were originally included therein. (iv) Recordable contracts shall not termintate until the sale of the land is consummated as approved by the Secretary.

- (b) Involuntary acquisition of excess land.-Project water may be delivered to lands which become excess when acquired by foreclosure or other process of law, by conveyance in satisfaction of mortgage, by inheritance, or by devise, subject to the following conditions: (1) Delivery is allowed only for a period of up to 5 years from the date of acquisition. Thereafter, delivery of water shall cease until the land is transferred to an eligible nonexcess owner. (2) The right to such temporary water deliveries is not transferable. (3) During the period of temporary water delivery, the land may be disposed of to nonexcess status without requiring price approval. (4) If the lands are not disposed of during the 5-year period, they become ineligible to receive project water until transferred to an eligible landowner at an approved price. Price approval will be required until one-half of the total construction costs allocated to irrigation have been paid in regular scheduled installments on the total construction obligation to which the lands are subject. (5) Such lands are not eligible to be placed under recordable contracts.
- (c) Lands acquired by surviving spouse.—Nonexcess lands which become excess to the ownership of a surviving spouse upon the death of a husband or wife may receive project water so long as the surviving spouse does not remarry. (1) The right to such temporary water deliveries is not transferable. (2) Prior to remarriage, the surviving spouse may dispose of such land to an eligible buyer without forfeiting the right of the land to receive project water, and without obtaining price approval if such approval is no longer required under § 426.9(b).
- (d) Excess lands owned by States, political subdivisions, and Agencies thereof.—Such lands are eligible for project water subject to the following conditions: (1) Excess lands are exempt from the acreage limitation provisions so long as they are farmed primarily in the direct furtherance of a non-revenue-producing public function, as determined by the Secretary of the Interior. (2) Excess

lands used for a purpose other than that set forth in paragraph (d) (1) of this section may receive project water if a valid recordable contract requiring the sale of such lands within 10 years from the date of such contract has been executed under terms and conditions satisfactory to the Secretary but without limitation upon selling price. (3) Lands not under recordable contract or farmed as a public function as provided in paragraph (d) (1) of this section may be leased until July 7, 1995, to lessees whose fee lands in combination with the leased State lands do not exceed the lessees' nonexcess entitlement. The sale price of such land shall not reflect value that can be attributed to the construction of the project.

(e) Lands administered or controlled by Federal Agencies.—If project water is delivered to lessees on Federal lands for farming purposes, the lessee shall be bound by the same acreage limitations as a landowner.

§ 426.6 Lands not eligible to receive project benefits.

- (a) Excess lands not covered by a recordable contract shall not be considered eligible to receive water from a project unless exempt from acreage limitation by law.
- (b) Land acquired into excess status after the announced date of initial availability of project water thereto is not eligible to be placed under recordable contract.
- (c) Excess lands many not be acquired subject to a recordable contract and continue to receive project water by virtue of that contract except that, in the discretion of the Secretary, land involuntarily acquired by inheritance, foreclosure, or other operation of law, may retain the remaining eligibility provided in the recordable contract upon execution of an assumption agreement in a form approved by the Secretary.

§ 426.7 Types of land ownership.

Reclamation law imposes no restriction on the amount of land that may be owned by an individual or group of individuals. The law restricts only the portion of land to which project water may be delivered or which may benefit from project facilities. For purposes of administering the acreage limitation provisions, the eligibility of lands is determined by the status of the owner or owners. After these regulations become effective, the Secretary will approve the sale of excess lands, at a price not reflecting project benefits and established by appraisal as described in §426.12, only to prospective owners who comply with the following forms of ownership.

- (a) Single ownerships.—(1) A single eligible nonexcess owner holds title to land in a sole and separate ownership.
 (2) A corporation composed of a single eligible nonexcess owner holds title to land in a sole and separate ownership.
- (b) Multiple ownerships.—Ownerships, including but not limited to tenancies in common, joint tenancies, and tenancies by the entirety, must comply with the following in order to hold more than 160 acres: (1) A family relationship must exist among all persons having a beneficial interest in the property, and (2) all persons having such beneficial interest must qualify as an eligible nonexcess owner.
- (c) Partnerships.—A partnership must comply with the following in order to hold more than 160 acres: (1) a family relationship must exist among all the partners, (2) each partner must qualify as an eligible nonexcess owner, and (3) each partner has a right to partition or alienate his share of the property.
- (d) Corporations.—A corporation must comply with the following in order to hold more than 160 acres: (1) A family relationship must exist among all the shareholders, and (2) each shareholder must qualify as an eligible nonexcess owner.

(e) Trusts.—Multiple beneficiary trusts may be utilized to hold up to one nonexcess entitlement of land receiving project water per beneficiary provided: (1) A family relationship exists among all beneficiaries. (2) Each beneficiary qualifies as an eligible nonexcess owner. (3) The trustee is unrelated to the trustor or the beneficiaries and is not an employee of the trustor. (4) The trust is irrevocable and constitutes a grant of all ownership, dominion, and control over a specifically described parcel of land. (5) The trust property consists solely of the land granted. (6) The trust document identifies each person who is a beneficiary and prescribes the undivided interest of each in the trust property, which undivided interest in no event shall represent a share in the total corpus of the trust greater than the ratio of one nonexcess entitlement to the total acreage of the trust. (7) The trustee named receives only compensation for management services, and neither acquires any interest of a beneficiary nor transacts in his individual capacity any business with the trust. Any attempt to do either shall be void. (8) The trustee makes periodic distribution of net returns from operations to beneficiaries in proportion to their undivided interests in the trust property. (9) If at any time the undivided interest of a beneficiary represents an area of land excess to that which he might hold as a nonexcess owner, the trustee shall designate a specific tract of the land in the trust equivalent to such excess. In the absence of such designation all land in the trust shall be deemed excess so long as that situation continues to exist. If a beneficiary acquires other land not in the trust which, together with his beneficial interest, exceeds that which he may hold as a nonexcess owner, the land not in the trust shall to the extent of such excess be deemed excess land. (10) Each beneficiary or guardian has the right, at his option, to a partition within the trust of his interest in the trust.

§ 426.8 Leases.

No person or legal entity shall be entitled to lease more than 160 acres of land served by federal water provided pursuant to the reclamation laws. Each lease of lands served by federal water must be filed with the District, which shall maintain a file for public inspection and report to the Department annually on the outstanding leases of lands within the District served by federal water.

§ 426.9 Nonexcess land.

An owner holding only nonexcess land may receive project water without designating his nonexcess holdings.

- (a) Designation.—(1) An excess landowner must designate the land that is entitled to receive project water as nonexcess land in accordance with the district contract with the United States. If he or she fails to do so within the specified time, the district shall make the designation and if it fails to do so, the Secretary will make the designation. (2) A landowner may, with the consent of the contracting officer, redesignate other lands as nonexcess: Provided, That: A like acreage becomes excess under the same terms and conditions as if such land had been excess at the time of the original designation and either (i) the land was acquired from nonexcess status or (ii) the land was acquired from excess status in an approved sale.
- (b) Period for which price approval is required for non-excess land acquired from excess status.—Nonexcess land acquired from excess status for an approved price must be sold at a price approved by the Secretary as not reflecting project benefits if resold within 10 years from the date of acquisition into nonexcess status to retain its eligibility to receive project water. For a period after 10 years and until one-half of the total construction costs allocated to irrigation have been paid in regularly scheduled installments on the total construction obligation in which the lands are situated, the Secretary shall monitor any resale to prevent unreasonable profit from accruing to the seller.

§ 426.10 Disposition of excess lands.

- (a) Excess lands must be disposed of to an eligible non-excess owner, at a price approved by the Secretary, based on their bonafide value at date of appraisal without reference to the enhancement attributable to the construction of project works, to become eligible to receive project water in the hands of the purchaser. (1) Price approval for all excess lands will be required until one-half of the total construction costs allocated to irrigation have been paid in regularly scheduled installments on the total construction obligation of the project in which the lands are situated. (2) Price approval will be required for all land under recordable contract, regardless of the status of payment of construction charges.
- (b) The excess landowner shall, no later than one year before power of attorney vests in the Secretary, divide his land under recordable contract into parcels of no more than 160 acres. If he or she fails to do so, the District shall, and it it fails to do so, the Secretary shall divide the land. (1) When the excess landowner desires to sell, and in no event less than six months before the power of attorney vests in the Secretary as provided in the recordable contract, the Secretary shall publish widely a notice of availability of such land, which describes the land and its possible uses, and which includes the expiration date of the recordable contract. (2) All prospective eligible nonexcess owners interested in purchasing a particular parcel shall file with the Regional Director a formal expression of interest which will describe their financial and other capacity to own and farm the land. (3) When the owner of the particular parcel under recordable contract desires to sell the land, or when power of attorney vests in the Secretary under the recordable contract, the Bureau shall select, by lottery or other impartial means from those expressing an interest, a purchaser of the land at the approved price; Provided, That a person in a family relationship with the excess land seller shall have a preference to buy the land offered. (4) The

prospective purchaser shall have nimety days to obtain financing. Extension of this period may be granted upon good cause. Such financing must comply with reasonable terms established by the owner, or, if power of attorney has vested, with the terms of the district contract with the United States.

- (c) When several purchasers obtain financing under a single loan instrument, the instrument must provide a partial release upon payment in full on the part of any single landowner.
- (d) Lands may not be obligated for the indebtedness of another.
- (e) The seller will not be permitted to lease the land back from the purchaser. The seller must not retain any interest in the land sold other than a purchase money mortage or other equivalent purchase money security instrument.
- (f) Personal and nonfixture farm property must be sold separately. The purchaser shall not be required to purchase personal and nonfixture farm property as a condition to purchasing the land.
- (g) Appraisals will be made in accordance with the guidelines and principles set forth in the controlling water service or repayment contract or as prescribed in § 426.12.
- (h) To be eligible to receive project water, lands disposed of by gift deed must be submitted for approval in the same manner as though the disposition was made in a bona fide sale.
- (i) A contract under which the owner of land agrees to sell the land to another person is an acceptable means of transferring the beneficial interest of land only if the contract is recorded and made a part of the official records in the county in which the land lies.
- (j) An individual may accumulatively purchase or hold excess lands up to a full entitlement only once.

§ 426.11 Commingling.

- (a) Project water may be stored in or transported from, through, or by means of nonfederally constructed facilities used to convey nonproject water if, in the opinion of the Secretary, such mingling is necessary to avoid duplication of facilities. The provisions of Reclamation law and of these regulations shall be applicable only to the quantity of project water thus involved. (1) When mingling of project water with nonproject water is permitted, the contractor shall be required to take such actions, keep such records, and install and maintain such measuring devices as in the opinion of the Secretary are necessary to ensure that at no time is the quantity of water delivered to, or removed as drainage water from, lands ineligible for project irrigation benefits under Reclamation law greater than the quantity introduced from nonproject sources.
- (b) The provisions of paragraph (a) of this section shall apply to any irrigation facility constructed jointly by Federal and State interests, unless specifically exempted by Congress.

§ 426.12 Appraisals of excess land.

All appraisals of excess land shall be made consistent with the following provisions:

- (a) Such appraisals shall be based on fair market value of the land at the time of appraisal, not including the increment resulting from the construction of a project.
- (b) Appraisals of excess land will be made upon request of the landowner or a prospective buyer, or when power of attorney, provided for in a recordable contract, vests in the Secretary.
- (c) All appraisals of excess land shall be made by an appraiser or panel of three appraisers designated by the Secretary. The party or parties requesting the appraisal may determine whether the appraisal is to be made by a

single appraiser or a panel of appraisers. The cost of the first appraisal, if requested by the landowner or determined necessary by the Secretary, shall be paid by the United States. The cost of all other appraisals shall be paid by the party or parties requesting the appraisal and shall be paid for under terms and conditions determined by the Secretary.

- (d) The value of all improvements on excess land such as structures, wells, pumps, permanent plantings and other property that may be included with a sale of excess land consistent with § 426.10(f) shall be appraised on the basis of its fair market value in accordance with standard appraisal procedures.
- (e) The Secretary shall determine the amount of nonproject water supply available to the designated property giving consideration to any riparian, adjudicated, or appropriated water rights. If an unadjudicated underground water supply is involved, an allocation will be made of the total available nonproject water in the aquifer as of the date of first water delivery to the district reduced by the quantity that would have been used on the basis of preproject crops and cropping patterns to an amount that would have been available on the date of appraisal, and supplemented by an allocation from the annual nonproject recharge to the aquifer from all locally available sources. The value of the designated property will reflect, among other things, the projected remaining economic life of the nonproject water supply, on the date of appraisal, as determined by the Secretary considering preproject crops and cropping patterns and annual nonproject recharge.
- (f) Appraisals of of excess lands that are requested after the sale has been consumated will not be approved by the Secretary. Excess lands sold without receiving prior price approval will not be eligible to receive project water until sold in accordance with procedures established by these regulations.

§ 426.13 Class I equivalency.

- (a) Class I land as defined in § 426.4(p) and irrigable lands in lower land classes will be determined in accordance with established procedures used by the Bureau of Reclamation to classify the irrigable land on a project whereby economic factors such as productive capactity of the land, taking into consideration cropping limitations imposed by latitude and climate, farm production costs and land development costs, are correlated with physical factors such as soil, topography, drainage and quality of water.
- (b) Class 1 equivalency factors are determined by comparing the productive potential of class 1 land, under average management, with the productive potential of lower class land so as to quantify the relationship of an acre of class 1 land to an acre of each of the lower classes of land in the project, (1) Class 1 equivalent acreage is determined through the application of factorial equivalents that will approximately equate the farm unit acreage of land of lower economic productivity to the economic productivity potential of class 1 land. Factorial equivalents based on physical and economic criteria shall be determined by the Secretary. For example, class 1=1, class 2=.8, class 3=.6 and class 4=.5, or .8, .6 and .5 acre of class 1 land equals 1 acre of class 2, class 3 and class 4 land respectively.
- (c) An individual's nonexcess entitlement using the class 1 equivalency concept, if authorized for a project, will be determined on the basis of his landholding in each land class. Nonexcess acreage of irrigable land classes below class 1 shall be determined through class 1 equivalency factors on the basis of the acres of such lower classes in excess of 160 acres which are necessary in weighted total acres held in single ownership to be equivalent to the acres of class 1 determined by the Secretary as adequate to support a family and pay water charges. The nonexcess entitlement of a landowner will be designated by the landowner, district or the Secretary in accordance with estab-

lished procedures set forth in standard language used for water service and repayment contracts. The nonexcess entitlement designation may consist of a combination of the acreage of each land class as determined when the designation is made and may not be revised unless prior approval is given by the contracting officer.

- (d) Class 1 equivalency can be used by a district only if its repayment or water service contract with the United States is amended to incorporate provision for the use of the class 1 equivalency concept as authorized by law.
- (e) Class 1 equivalency factors that are established for a district will be published in the FEDERAL REGISTER at least 60 days prior to their application to lands of the district.

§ 426.14 Decisions and appeals.

The Regional Director acting as designee of the Secretary shall make the determination required under these rules and regulations. A party directly affected by such determination may appeal in writing to the Commissioner of the Bureau of Reclamation within 30 days of receipt of the Regional Director's determination. The affected party shall have an additional 30 days thereafter within which to submit a supporting brief or memorandum to the Commissioner. The Regional Director's determination will be held in abeyance until the Commissioner has reviewed the matter and rendered a decision. Pertinent addresses are shown below:

[Addresses omitted.]

APPENDIX T AFFIDAVIT OF ROBERT F. CARTER

COUNTY OF IMPERIAL)
) SS
STATE OF CALIFORNIA)

Robert F. Carter, being first duly sworn, deposes and says:

I am presently Executive Officer to the Board of Directors of Imperial Irrigation District, petitioner herein. I was formerly General Manager of Imperial Irrigation District and I am familiar with all of its records, including the contract between Imperial Irrigation District and the United States dated December 1, 1932, for construction of the All-American Canal, and the supplement thereto dated March 4, 1952.

The total obligation of Imperial Irrigation District to the United States for construction of the All-American Canal was originally in the amount of \$25,020,000.00. Installments have been paid from time to time as provided in said contract, and, as of March 1, 1978, the balance owing was \$12,385,000.00, less than one half of the original total.

/s/ Robert F. Carter ROBERT F. CARTER

Subscribed and sworn to before me this 30th day of August, 1979.

/s/ C.J. Staab NOTARY PUBLIC

My commission expires June 6, 1980

APPENDIX U

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

V.

IMPERIAL IRRIGATION DISTRICT, a corporation,

Defendant,

JOHN M. BRYANT, et al., Intervenors, both individually
and on behalf of members of a class, to-wit, all persons
owning more than 160 acres of irrigable land within the
Imperial Irrigation District,

STATE OF CALIFORNIA.

Intervenor,

BEN YELLEN, et al.,

Applicants for Intervention.

Civil No. 67-7-T

AFFIDAVIT OF BEN YELLEN IN SUPPORT OF MOTION TO INTERVENE

STATE OF CALIFORNIA)	
COUNTY OF IMPERIAL)	SS.

BEN YELLEN, being duly sworn, deposes and says:

- 1. I am one of the petitioners for intervention in this action. I am also one of the plaintiffs in Civil Action No. 69-124 now pending in this court, entitled, "Ben Yellen, et al., Plaintiffs, vs. Walter J. Hickel, et al., Defendants". The latter action is to compel the Secretary of the Interior to enforce the residency requirement of Section 5 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C.A. Section 431 against absentee landowners.
- 2. My address is 128 South 8th Street, Brawley, California.
 - 3. My occupation is physician.
- 4. For more than the past five years, I have been personally acquainted with all of the other petitioners who are now seeking to intervene in this proceeding. Most of said petitioners are agricultural workers who have been so employed within the Imperial Valley and in particular within the geographical boundaries of the Imperial Irrigation District. None of the petitioners, including myself, own farm land anywhere in the United States, and all of us wish to own land and to engage in farming on that land.
- 5. If the Government had prevailed in this litigation, the Applicants and persons similarly situated would attempt to purchase the excess lands under the terms and conditions set by the Secretary of the Interior.
- 6. I am acquainted with the cost of land within the Imperial Irrigation District. Land that is without water has a market value and sells for approximately \$25.00 to \$50.00 per acre. Land that is irrigated with federal reclamation water by the Imperial Irrigation District has a value and sells for between \$1200.00 to \$1400.00 per acre.
- 7. As a practical matter, the applicants are unable to purchase irrigated lands unless the Government appeals the judgment of this Court and ultimately prevails, so that

the excess lands will be sold under reasonable terms and conditions set by the Secretary of the Interior.

/s/ Ben Yellen

Subscribed and sworn to before me on March 14, 1971.

/s/ Jean H. Schmitt Notary Public

APPENDIX V

Summary of Administrative Practice of the Department of the Interior Relating to the Inapplicability of the Excess Land Laws to Imperial Irrigation District

February 24, 1933. Opinion letter issued by Secretary Ray Lyman Wilbur advising that the acreage limitation of the reclamation law did not apply to private lands in the Imperial Valley.

March 20,1934-June 22, 1936. Secretary Harold Ickes allocated \$22 million to the Canal from various public works and relief acts in his dual role as Director of the Public Works Administration and Secretary of Interior. For example, "allotments" of \$6,000,000 came from the National Industrial Recovery Act of June 16, 1933, 48 Stat. 275, \$3,000,000 from the Emergency Appropriation Act of 1934, 48 Stat. 1055, and \$3,000,000 from the Act of April 8, 1935, 49 Stat. 115. See Interior Department Appropriation Bill, 1937: Hearings before Subcommittee of House Committee on Appropriations, 74th Cong., 2d Sess. 1162 (1936), and Interior Department Appropriations Bill, 1936: Hearings before Subcommittee of House Committee on Appropriations, 74th Cong., 1st Sess. 101 (1935). Prior to June 22, 1936, all funding for the All-American Canal came from discretionary funds. After June 22, 1936, the All-American Canal became a line-item in the Interior Department's budget. See Appropriation Act of June 22, 1936, 49 Stat. 1785.

February 26, 1934. The judgment of Hewes v. All Persons became final, confirming the validity and legality of the contract, when the California Supreme Court granted the parties' motions to dismiss. Exactly one month before this, counsel for Malan wrote to Secretary Ickes objecting to statements made by the Secretary blaming the litigants

for project delays which were perceived as placing undue pressure on Malan to dismiss the appeal.

1941. Issuance of a report entitled "The Excess Land Provision of the Federal Reclamation Law," prepared by B.P. King, attorney in the Bureau of Reclamation, pursuant to Secretary Ickes' instructions, concluding that the excess lands provisions of the federal reclamation law were not applicable to the Imperial Valley.

1942. Commissioner Page of the Bureau of Reclamation advised the General Counsel of the Federal Land Bank, which was making loans on farms lands in the District, that the limitation did not apply to lands within the Imperial Irrigation District.

1946. Publication by the Bureau of Reclamation of a survey entitled, "Landownership Survey on Federal Reclamation Projects," which stated that there was no excess land acreage in the Imperial Valley.

May 31, 1945. Opinion by Solicitor Fowler Harper stating that the acreage limitation provision of reclamation laws should be incorporated in the Coachella supplemental contract, but noting that Imperial Valley was exempt from the excess land law.

1948. Secretary Krug reaffirmed the original opinion of Secretary Wilbur.

February 5, 1958. Letter from Interior Department Solicitor Bennett to the Solicitor General of the United States, in connection with the then pending case of Arizona v. California, confirming the Interior Department's policy that the acreage limitation did not apply to Imperial Irrigation District.



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IMPERIAL IRRIGATION DISTRICT, ET AL., Petitioners,

V.

BEN YELLEN, ET AL., Respondents.

PETITIONER'S REPLY BRIEF

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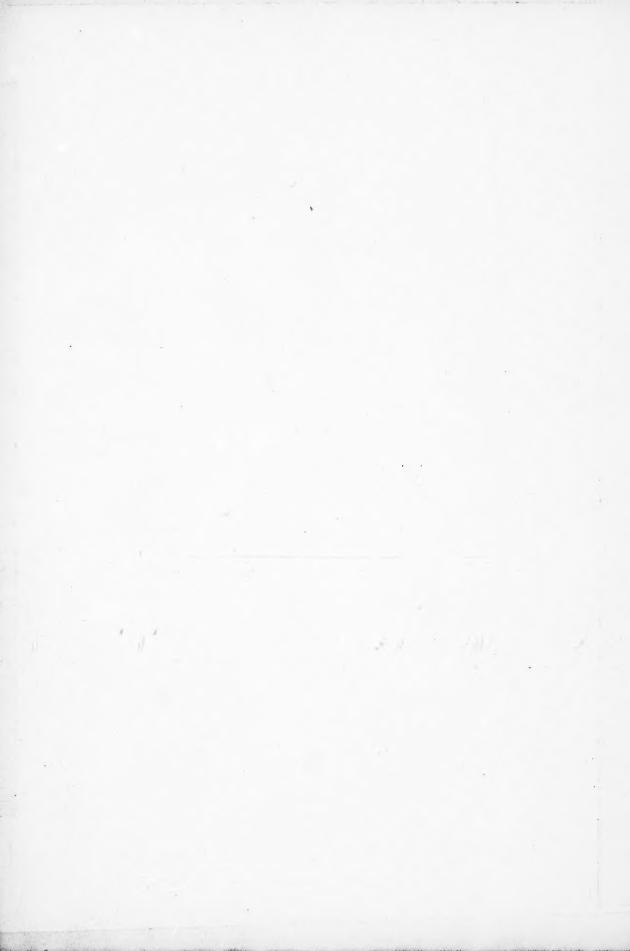
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November 26, 1979



IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-435

IMPERIAL IRRIGATION DISTRICT, ET AL., Petitioners,

v.

BEN YELLEN, ET AL., Respondents.

PETITIONER'S REPLY BRIEF

Pursuant to Rule 24(4), Petitioner Imperial Irrigation District ("the District") herein submits its reply brief addressed to arguments which are raised for the first time in the "Memorandum in Opposition" filed by Respondents Ben Yellen, et al., in Nos. 79-421, 79-425, and 79-435.

Fundamental to the District's theory of this case is the fact that it arises under the Boulder Canyon Project Act ("Project Act"), which requires the Secretary to deliver water necessary to satisfy present perfected rights.' Until now, neither this Court nor any lower federal court has ever ruled on the question of whether

¹ The present perfected rights involved in this case were quantified by this Court's supplemental decree of January 9, 1979, in *Arizona* v. *California*, 439 U.S. 419. See the District's Potition at 4.

the Project Act requires that delivery of water be limited to 160 acres in single ownership.²

Respondents argue that, because the Project Act does not contain an express exemption from the acreage limitation provisions of the Reclamation Law, it must incorporate those provisions. In support of this proposition, they cite (Resp. Br., at 12) the following statement by this Court in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958):

"Significantly, where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such exemption by express enactment." 357 U.S., at 292.

Respondents' argument overlooks the fact that the Project Act does expressly exempt the Boulder Canyon Project from acreage limitation provisions of the Reclamation Law to the extent that those provisions would prevent the satisfaction of present perfected rights. Congress could have worded this exemption in a number of different ways. The language it chose was as follows:

"Sec. 6. The dam and reservoir . . . shall be used . . . for . . . satisfaction of present perfected rights

"Section 14. This act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." (emphasis added.)

² A state court has held that the Boulder Canyon Project Act does not authorize acreage limitations in Imperial Valley. See the District's Petition at 25-26.

Thus, the plain language of § 14 indicates that the Reclamation Law is incorporated only to the extent that it is not in conflict with other provisions of the Project Act. And § 6 of the Project Act specifically requires that present perfected rights be satisfied. Congress could hardly have been more explicit in creating an exemption from the acreage limitation provisions of the Reclamation Law for lands to which present perfected rights are appurtenant.

To hold that the Project Act does not exempt lands to which present perfected rights are appurtenant would do violence not only to the plain language of the Act, but to well-settled rules of statutory construction. As explained in the District's Petition, if § 14 of the Project Act is construed to make the acreage limitation provisions of the Reclamation Law applicable to the District, § 14 is in conflict with § 6 and renders § 6 nugatory. Such a construction would violate the fundamental rule of statutory interpretation that:

"An interpretation of the statute which would ... render different sections inconsistent with each other, cannot be the true one." Perrine v. Chesapeake & D. Canal Co., 50 U.S. [9 How.] 172, 187 (1850).

Conflict between § 6 and § 14 can be avoided, and both sections can be given effect, if the limiting language of § 14—"except as otherwise herein provided"—is construed to mean just what it says. The plain meaning of this language is that under § 14 the Reclamation Law does not apply to the extent that it is in conflict

³ See the District's Petition at 14-19.

with § 6 or any other part of the Project Act. That is to say, there is an exemption from the acreage limitation provisions of the Reclamation Law for lands having appurtenant present perfected rights.

A corollary to the rule that a statute should be interpreted so as to render its various provisions consistent with one another is the rule that, where a statute contains specific and general provisions in apparent contradiction, the specific provisions prevail. The Court articulated this rule in *Townsend* v. *Little*, 109 U.S. 504 (1883), as follows:

"[G]eneral and specific provisions, in apparent contradiction, whether in the same or different statutes... may subsist together, the specific qualifying and supplying exceptions to the general...." 109 U.S., at 512.

In Missouri v. Ross, 299 U.S. 72 (1936), the rule was stated in the following terms:

"[S]pecial provisions prevail over general ones which, in the absence of the special provisions, would control." 299 U.S., at 76.

The § 6 requirement that present perfected rights be satisfied is a specific provision, while the § 14 incorporation of the Reclamation Law is a general provision. To the extent these two are in conflict (and, as explained above, they need not be in conflict if effect is given the limiting language of § 14), § 6 must prevail. Again, the result is an exemption from acreage limitations where present perfected rights are involved.

As explained in the District's Petition at 24, the Department of the Interior for more than 34 years con-

sistently interpreted the Project Act as not requiring acreage limitations in Imperial Valley. In an apparent effort to refute this administrative construction, Respondents state:

"[T]he acreage limitation was interpreted [by the Department of the Interior] to apply in the Coachella Valley, but not the Imperial Valley, although water was delivered under the Project Act to both through the All American Canal." Resp. Br., at 8.

This statement is misleading because Coachella Valley County Water District has no present perfected rights which the Secretary must satisfy under § 6 of the Project Act. Delivery of water from the Colorado River to Coachella Valley did not commence until 1952; this Court's decision in Arizona v. California, 373 U.S. 546 (1963), restricts present perfected rights to quantities of water used prior to June 25, 1929, the effective date of the Project Act. Obviously, in places like Coachella that have no present perfected rights, § 6 of the Project Act (which requires the satisfaction of present perfected rights) is not applicable. Therefore, administrative construction of the Project Act with respect to Coachella Valley is not relevant to determining the proper application of § 6 to Imperial Valley.

In response to the District's contention that the Court of Appeals' decision is in conflict with the decrees of this Court in *Arizona* v. *California*, 376 U.S. 340 (1964), 439 U.S. 419 (1979), Respondents argue only that:

"[N]either Secretary Wilbur nor Executive Assistant Ely considered 'present perfected rights'

to be relevant to the issues raised by petitioners." Resp. Br., at 12.

This statement is both specious and irrelevant. It is specious because Secretary Wilbur's determination that neither the Project Act nor the contract required acreage limitations expressly turned on the existence of vested water rights in the Imperial Valley. It is true that the ruling did not refer to these rights as "present perfected rights," but to argue that the ruling therefore did not consider present perfected rights to be relevant is to elevate form over substance. By definition, present perfected rights are vested rights, and there was no question that the "vested rights" referred to in the Wilbur ruling were the same present perfected rights that are involved here.

Moreover, the 1933 Wilbur ruling could in no event be relevant to the question of whether the Court of Appeals' opinion, rendered in 1978, would impair present perfected rights. Such rights were defined in the Court's 1964 decree, and quantified in its 1979 decree. (Inasmuch as the subject of present perfected rights was never briefed or argued in the Court of Appeals, that court may have been unaware that its decision would frustrate this Court's 1979 decree).

Respondents also argue that the Court of Appeals' decision:

"is completely consistent with . . . this Court's decision in *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275 (1958)." Resp. Br., at 11-12.

This statement is misleading. The Ivanhoe case did not involve the Boulder Canyon Project Act. Rather, it involved projects constructed under authority of the various acts authorizing the Central Valley Project in California. These acts did not contain any provisions for the satisfaction of present perfected rights. Nor did any of the landowners or the irrigation districts involved in Ivanhoe have present perfected rights or even vested rights. Moreover, the parties to the contracts in Ivanhoe agreed, and so represented to the court in the validation proceedings, that the contracts and the applicable statutes required acreage limitations, whereas in the present case, the parties to the contract agreed to the opposite, namely, that neither the relevant statute nor the contract required acreage limitations, and so represented to the court in the validation proceedings. Thus, the Ivanhoe decision has no relevance at all to the controversy in Imperial Valley.

Respondents do not answer the District's arguments (i) that it is impossible, factually and legally, to redistribute the water subject to present perfected rights within the District, (ii) that 28 U.S.C. § 1738 requires that full faith and credit be given to the California Superior Court's determination that acreage limitations do not apply to Imperial Valley, and (iii) that

[&]quot;It is interesting to note that irrigators in this district receive water diverted from San Joaquin in which they never had nor were able to obtain any water right." 357 U.S., at 285.

Respondents lack standing. Accordingly, this Reply Brief does not address these subjects.

Respectfully submitted,

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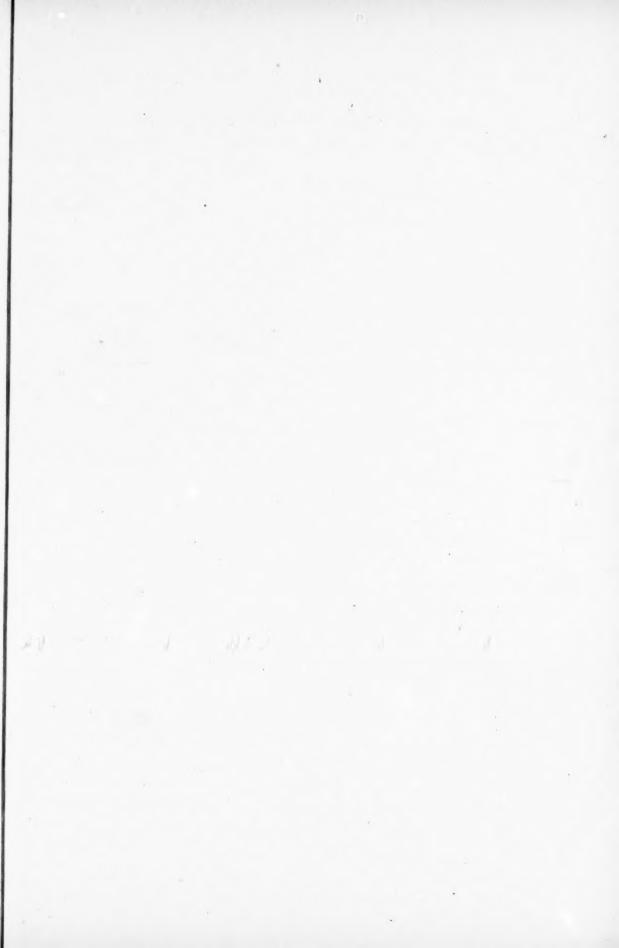
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BRIEF OF PETITIONER IMPERIAL IRRIGATION DISTRICT

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BRIEF OF PETITIONER IMPERIAL IRRIGATION DISTRICT

OPINIONS BELOW

The principal opinion of the Court of Appeals is reported at 559 F.2d 509 (9th Cir. 1977), and appears at App. 1a. The opinion of the Court of Appeals modifying its principal opinion and denying the District's petition for rehearing is reported at 595 F.2d 524 (9th Cir. 1979), and appears at App. 64a. The opinion of the District Court (Turrentine, District Judge) is reported at 322 F. Supp. 11 (S.D. Cal. 1971), and is printed at App. 78a. The order of the District Court

^{&#}x27;In this brief, "App." is used to designate the appendix to Imperial Irrigation District's Petition for Certiorari. References to the Consolidated Appendix are indicated "Con. Apx."

denying the motion of respondents Ben Yellen, et al., for leave to intervene after judgment to prosecute an appeal is unreported and is reproduced at App. 112a. The decision of the Court of Appeals reversing that order of the District Court is an appendix to the opinion of the Court of Appeals, 559 F.2d, at 543, and appears at App. 62a.

JURISDICTION

The judgment of the Court of Appeals was entered August 18, 1977, and was subsequently modified by an order entered April 23, 1979, which denied Imperial Irrigation District's petition for rehearing. The jurisdiction of the Supreme Court was invoked under § 1254(1) of the Judicial Code, 62 Stat. 928, by a petition for certiorari filed September 14, 1979. Certiorari was granted December 3, 1979.

STATUTORY PROVISIONS INVOLVED

Relevant extracts from the statutes and compact involved are printed in the Appendix to Imperial Irrigation District's Petition for Certiorari beginning at page 155a. They are:

- Boulder Canyon Project Act, 45 Stat. 1057, §§ 1, 4(a), 4(b), 5, 6, 8, 9, 12, 13, 14 and 18, 43 U.S.C. §§ 617, c(a), c(b), d, e, g, h, k, l, m, and q. (App. 155a.)
- Colorado River Compact, 70 Cong. Rec. 324 (1922), Art. VIII. (App. 168a.)
- Act to Provide for the Application of the Reclamation Law to Irrigation Districts, 42 Stat. 541, § 1, 43 U.S.C. § 511. (App. 169a.)

- Colorado River Basin Project Act, 82 Stat. 886, § 301(b), 43 U.S.C. § 1521(b). (App. 171a.)
- Reclamation Act of 1902, 32 Stat. 388, §§ 3, 5, and 8, 43 U.S.C. §§ 372, 383, 392, 416, 431, 434, and 439. (App. 172a.)
- Omnibus Adjustment Act of 1926, 44 Stat. 649, as amended, 70 Stat. 524, § 46, 43 U.S.C. § 423(e). (App. 174a.)
- Judicial Code, 62 Stat. 689, § 1738, 28 U.S.C. § 1738. (App. 176a.)

QUESTIONS PRESENTED

- 1. Whether the Boulder Canyon Project Act and this Court's opinion and decrees in Arizona v. California require the delivery of water in satisfaction of "present perfected rights," as defined therein, on privately owned lands in excess of 160 acres?
- 2. Whether principles of finality preclude the reversal of administrative and judicial determinations that vested water rights are not subject to impairment by the excess lands provisions of the reclamation law?
- 3. Whether an alleged "desire" to buy land at less than its market value at prices to be fixed by the Secretary of the Interior under § 46 of the Omnibus Adjustment Act of 1926 created standing to intervene and appeal from a District Court judgment against the United States from which the United States did not appeal? And, if so, whether such standing ceased, upon the termination of the Secretary's authority to fix prices for excess lands, during the pendency of the appeal?

STATEMENT OF THE CASE

The Decisions Below

This suit was instituted by the United States against Imperial Irrigation District ("the District") at the request of the Secretary of the Interior ("the Secretary") in 1967. The Secretary sought a declaratory judgment that the acreage limitation provisions of the reclamation law, particularly § 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 649, 46 U.S.C. § 423 (e), apply to privately owned lands in the District which receive Colorado River water through the All-American Canal. Specifically, he asked for a declaration that water should not be delivered to lands in excess of 160 acres per landowner unless and until the landowner agrees to sell the excess lands at prices approved by the Secretary.

The State of California intervened in the District Court proceedings as *parens patriae* and as owner of lands in a waterfowl reserve.

² The term "acreage limitation" is a species of statutory limitation on the amount of irrigable land in single ownership that is eligible to receive project water from federal reclamation projects. Various statutes provide for acreage limitations in overlapping and sometimes inconsistent terms. These include: the Reclamation Act of 1902, §§ 3, 5, 32 Stat. 388-89 (1902), 43 U.S.C. §§ 416, 432, 434; Act of February 2, 1911, 36 Stat. 895, 43 U.S.C. § 374; Warren Act, § 2, 36 Stat. 926, 43 U.S.C. § 524; Act of July 24, 1912, 37 Stat. 200, 43 U.S.C. § 449; Act of August 9, 1912, § 3, 37 Stat. 266, 43 U.S.C. §§ 543, 544; Act of August 13, 1914, § 12, 38 Stat. 689, 43 U.S.C. § 418; Act of August 11, 1916, § 5, 39 Stat. 508, 43 U.S.C. § 627; Act of August 11, 1916, § 6, 39 Stat. 508, 43 U.S.C. § 628; Act of January 25, 1917, §§ 1-4, 39 Stat. 868; Act of May 20, 1920, 41 Stat. 605, 43 U.S.C. § 375; Omnibus Adjustment Act of May 25, 1926, 44 Stat. 649, 46 U.S.C. § 423e; and Act of October 14, 1941, 54 Stat. 1119, 16 U.S.C. § 590z-2(c)(5).

John M. Bryant and certain other landowners intervened as defendants on their own behalf and as representatives of a class comprised of all persons (some 800 in number) owning more than 160 acres of irrigable land within the District.

Ben Yellen, M.D., and the other individual respondents, intervenors after judgment, alleged a desire to buy land from the present owners at prices substantially below market values, and that they would be able to do so if the present owners were denied water from the All-American Canal unless they agreed to sell their excess lands at prices established by the Secretary.

The District Court, after trial, entered judgment against the United States, holding that the acreage limitation provisions of reclamation law have no application to privately owned lands within the District. 322 F. Supp., at 11.

Respondents applied for leave to intervene to appeal in the event the United States decided not to appeal. The District Court denied leave to intervene for this purpose. App. 112a. The United States decided not to appeal. Respondents appealed the order denying leave to intervene.

In the meantime, respondents, in a separate case, obtained a District Court decision (by another judge)

Solicitor General Griswold explained:

[&]quot;I considered the matter carefully and thoroughly, and over a considerable period of time. As a result of my consideration, I became convinced that (a) we would not win the case in the court of appeals, and (b) we should not win it. In this situation, I came to the conclusion that it was my duty as a responsible officer of the government not to authorize an appeal." 117 Cong. Rec. 46228 (1971).

that the "residency requirement" of § 5 of the Reclamation Act of 1902 applies to lands within the District. Yellen, et al. v. Hickel, 335 F. Supp. 200 (S.D. Cal. 1971); 352 F. Supp. 1300 (S.D. Cal. 1972). In the "residency case," respondents alleged that they would be able to buy land at prices they could afford if the residency requirement of § 5 of that Act were applied. The Court of Appeals then reversed the order denying intervention in the present case (the "acreage case") on the basis that there might be two conflicting decisions in the Ninth Circuit. 559 F.2d, at 543.

The two cases ("residency" and "acreage") were calendared for argument before the same panel. Almost three and one-half years after argument, the Court of Appeals ordered dismissal of the residency case for lack of standing, id., at 519, but reversed the District Court's judgment in the acreage case as to both standing and the merits. Id., at 523-524, 542.

The Relationship of This Case to Arizona v. California

The central issue in this case involves the conflict of the decision of the Court of Appeals below with the opinion and decrees of this Court in Arizona v. California construing the authority of the Secretary under the Boulder Canyon Project Act ("Project Act"), 45 Stat. 1057, 43 U.S.C. §§ 617 et seq.

[&]quot;[N]o such sale [of a right to the use of water for land in private ownership] shall be made to any landowner unless he be an actual bona fide resident on such land" 32 Stat. 389, 43 U.S.C. § 431.

⁵ See App. 14a-16a, and p. 77 of this brief, for the Court of Appeals' discussion of the curious history of the standing issue in the residency case.

The opinion of this Court in Arizona v. California, 373 U.S. 546 (1963), held that the Secretary is required by § 6 of the Project Act, read in conjunction with other references in that act (e.g., §§ 4(a), 8, and 13) to the Colorado River Compact, to deliver water in satisfaction of "present perfected rights" pursuant to Article VIII of the Compact, which requires that such rights shall be unimpaired. "Present perfected rights" as defined by this Court in its original decree in Arizona v. California, 376 U.S. 340 (1964), are water rights perfected under state law or reserved under federal law prior to June 25, 1929—the effective date of the Project Act.

This Court has described the § 6 requirement that present perfected rights be satisfied as "one of the most significant limitations" on the Secretary's discretion to deliver water under authority of the Project Act. 373 U.S., at 585.

This Court's supplemental decree in Arizona v. California, 439 U.S. 419 (1979), which adjudicated the magnitudes and priority dates of present perfected rights in Arizona, California, and Nevada, requires the Secretary to deliver to the District the lesser of (i) 2,600,000 acre-feet of annual diversions or (ii) the amount of water required to irrigate 424,145 acres, with a priority date of 1901—these being the District's "present perfected rights" established by actual use of water in that quantity on that area of land prior to the effective date of the Project Act.

⁶ The opinion contains ten references to the Act's protection of present perfected rights, at pages 566, 567, 581, 582 n. 83, 584 (two references), 585, 588, 594, 600.

On the other hand, the Court of Appeals' opinion would require the Secretary and the District to withhold delivery of water from some 60 percent of the decreed area, 233,000 acres, characterized as "excess lands" (areas in excess of 160 acres per owner), unless the owner agrees to sell those lands at prices to be fixed by the Secretary. It is conceded by the Court of Appeals that owners cannot be compelled to sell.

Thus, the Court of Appeals' opinion, if given effect, would stop the delivery of water to some 233,000 acres that were being irrigated from the Colorado River, without federal assistance, more than a half century ago (and in some cases three quarters of a century ago), long before there was a Boulder Canyon Project, unless their owners agree to sell them at prices to be fixed by the Secretary at less than their value.

As the Court of Appeals' opinion on rehearing candidly put it, "Those who own excess lands will be required to sell the excess at below-market prices, or will no longer receive water for irrigating those lands," notwithstanding that "it is also clear from the record in this case that land in the Imperial Valley has long been devoted to agricultural use, that the entire economy of the Valley is based on agriculture and agricultural support industries, that the particular 233,000 acres involved constitutes some of the finest agricultural land in the world, and that federal irrigation facilities provide the only assured source of water in the Valley." * 595 F.2d, at 528.

⁷ This figure appears in the Court of Appeals' opinions, 559 F.2d, at 522, 595 F.2d, at 528, 530 n. 6.

^{*}Federal irrigation facilities became "the only assured source of water in the valley" under the Project Act which, in § 6, as-

Land Speculation

If water should be denied to the present owners of these lands, speculators would be the newly enriched beneficiaries of the decision. The principal respondent, Dr. Yellen, is on record with an affidavit in which he says that if the government were to prevail in this action he and persons similarly situated anticipate being able to purchase land worth \$1200 to \$1500 per acre (as of 1971) for \$25 to \$50 per acre. App. 245a. Thus, Dr. Yellen, et al., if they prevail in this suit, will be able to use § 46, which was intended by Congress to prevent speculation, to achieve windfall profits. The Department of the Interior has conceded as much. In proposed regulations published some 10 years after this litigation commenced, the Department stated its intention to reverse "the current practice of allowing an excess land purchaser to realize the windfall profits represented by low-priced federal water in an immediate resale." App. 219a. Unfortunately, however, these regulations, if ever enacted, would not prevent Dr. Yellen, et al., from reaping windfall profits because they limit price controls on resale only until one-half of the project's costs are repaid—an event which has already occurred with respect to the All-American Canal, by the efforts of the landowners who, according to the Court of Appeals, remain subject to the Secretary's power to fix prices notwithstanding that repayment.

sured the satisfaction of the preproject water rights of these same lands. See p. 25, infra.

The proposed regulations were published August 22, 1977, but the date for receipt of comments has been postponed to the end of 1980, with the expectation of putting them into effect in July 1981, nearly four years after initial publication. It is not certain that the regulations will ever be promulgated in the form proposed, or at all.

Historical Background: The origin of Imperial Irrigation District's present perfected rights

At the outset we wish to dispel any notion that this case involves rights to use "low-priced federal water." The water rights at stake here are not—and never have been—owned by the federal government. The District's present perfected rights came into existence without federal assistance, financial or otherwise, by the efforts of pioneer settlers who succeeded, despite enormous hardships, in converting one of the world's most inhospitable deserts into one of its most productive agricultural areas."

The following is a condensation of the narrative given in the opinion of District Judge Turrentine: 11

"The initial appropriations and diversions of water from the Colorado River were made by the California Development Company, a privately owned corporation organized in 1896 and the predecessor in interest of defendant District, which was organized in July of 1911. These appropria-

Valley were acquired from the United States prior to or soon after the turn of the century, by entry under the Desert Land Act, 43 U.S.C. §§ 321 et seq., or other homestead laws, 43 U.S.C. §§ 161 et seq. All of these laws required the applicant to have lived on these desert lands for a specified period of years. The Desert Land Act required proof of acquisition of a water right under state law by bona fide prior appropriations. The history of the homestead laws, in relation to federal laws concerning irrigation, is summarized in California v. United States, 438 U.S. 645, 655-663 (1979).

¹¹ See also Arizona v. California, 373 U.S. 546, 552-553. The historical material on the development of Imperial Valley, and on the Colorado River Compact and the Project Act, is voluminous. It is cited and summarized in *The Hoover Dam Documents, House Document No. 717*, 80th Cong., 2d Sess., at 1-31 (1948). The evolution of the Project Act in the four successive Swing-Johnson bills is traced there at 32-59.

tions and diversions laid the foundation for the present perfected water rights which have admittedly existed within the boundaries of the District from and after June 25, 1929, the effective date of the Boulder Canyon Project Act.

"The first water from the Colorado River was diverted and brought to the Valley in July of 1901. This water, which was diverted about one mile north of the international boundary with Mexico, was carried by the Alamo Canal through Mexican territory and back into the United States at Imperial Valley to avoid the high mesa and sandhill country north of the international boundary. For most of its 50 mile course in Mexico, this canal made use of an ancient overflow channel known as the Alamo River, which formerly led into the Salton Sea.

"By 1903, through the distributive facilities constructed by the local mutual water companies, approximately 25,000 acres of valley lands were in irrigated cultivation, all as a result of diversions from the River. By the following winter, the irrigated acreage was increased to 100,000. 181,191 acres were irrigated by 1910, 308,009 in 1916, 413,440 in 1919, and 424, 145 in 1929, the year when the Boulder Canyon Project Act took effect.

"At the time of the taking effect of said Project Act, the District had a distribution and drainage system which was wholly financed, constructed, maintained and operated by local means. The distribution system then, as of June 25, 1929, comprised approximately 1,700 miles of main and lateral canals, providing for the irrigation by waters diverted by it from the Colorado River of approximately 424,000 privately owned acres, computed on a single cropping basis. All of this acreage was, as of June 25, 1929, being irrigated by

and with Colorado River water, carried through the Alamo Canal. In 1966, just prior to the bringing of this action, there were approximately 438,-000 acres irrigated with water transported through the All-American Canal." 322 F.Supp., at 12-14.

The Colorado River Compact

On November 24, 1922, the Colorado River Compact, an interstate agreement relating to allocations and rights in the waters of the River, was signed by commissioners representing the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, and by Herbert Hoover, as representative of the United States. It became effective June 25, 1929.¹²

Under the Compact, quantities of consumptive use were apportioned in perpetuity to the Upper Basin and the Lower Basin. The four upper States (Colorado, New Mexico, Utah, and Wyoming), in return, agreed not to deplete the flow of the river at a division point (Lee Ferry, Arizona) below stated aggregates in ten-year periods, and both groups agreed to share the burden of any future treaty with Mexico. The protection of prior vested rights was dealt with in Article VIII, which provided:

"Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. . . ." 13

¹² The Colorado River Compact was authorized by an Act of Congress dated August 19, 1921, 42 Stat. 171, and by the acts of the legislatures of the participating states. Congress approved it in § 13 of the Project Act, 43 U.S.C. § 6171. See also, § 4(a) thereof.

¹⁸ The full text of Article VIII appears at App. 168a.

The Boulder Canyon Project Act

The Project Act was signed by President Coolidge on December 21, 1928." It was the last of the four "Swing-Johnson" bills, considered in as many Congresses. The Act inter alia (i) in §§ 4(a) and 8 gave consent to the Colorado River Compact, and in §§ 8 and 13 subjected the United States and those claiming under it to that compact; (ii) in § 1 authorized construction of a storage dam (now named Hoover Dam) and power plant, mandating in § 6 that the dam and reservoir be used "[f]irst, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power"; (iii) directed in § 5 that no one should have the use of the stored water except by contract with the Secretary; and (iv) in § 1 authorized the construction of the All-American Canal.

Section 14 declared the Act to be deemed a supplement to the reclamation law, "which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided (emphasis added)." The Act in § 9 contained a specific acreage limitation, but

of delays of the States in meeting the requirements of § 4(a) for their ratification of the Colorado River Compact as a seven-state agreement, or, in the alternative, as a six-state agreement (in the event that Arizona refused to ratify), accompanied, in the latter event, by the enactment by California of an act limiting her rights to water, including "present perfected rights and all other rights which may now exist," to specified quantities. The accomplishment of the latter alternative was proclaimed by President Hoover on June 25, 1929.

that limitation in explicit terms applied only to public lands that the Secretary might open to entry (there are no public lands open to entry in the District).

The exception to the reclamation law provided for in § 14 reflected the innovative character of the Project Act. This was the first great multiple-purpose project. The Project Act differed from all previous water resource project authorizations in almost every respect. The Boulder Canyon Project was to be financed from the general treasury, not the Reclamation Fund.15 The amount authorized to be appropriated in $\S 2(b)$, \$165,000,000, was in excess of the combined total of all previous reclamation projects. In lieu of the Reclamation Fund, a new fund in the Treasury, the Colorado River Dam Fund, was created in § 2(a), into which all federal appropriations, and all future revenues, were to be paid, and out of which all disbursements were to be made. Disposition of the revenues of this fund bore no relation to the disposition of revenues of the Reclamation Fund.

The Secretary was required by § 4(b) of the Project Act to have in hand contracts assuring the repayment of the whole federal investment, plus operation and maintenance, before any money could be appropriated. In this respect, the Project Act differed drastically from the Omnibus Adjustment Act, enacted two years earlier, which only required that reclamation project

¹⁵ The Reclamation Fund, created by § 1 of the 1902 Reclamation Act, 32 Stat. 388, 43 U.S.C. § 391, is a fund into which certain federal revenues from the western states, e.g., certain proceeds from the sale of public lands, oil and mineral royalties from public lands, etc., are paid. Initially, all appropriations for reclamation projects were made out of this fund, and the aggregate amount of such appropriations was limited to the fund's income.

repayment contracts be in hand before commencement of delivery of water, not before construction. As to flood control (usually a non-reimbursable item), while an allocation of \$25,000,000 was made to this function, this amount was required by $\S 2(b)$ to be repaid out of revenues in excess of those required for amortization of the investment in the dam and power plant.

Contracts for storage and delivery of water under § 5 were to be "for permanent service," whereas similar contracts under the reclamation law are for a fixed period.

The All-American Canal Contract and the Hewes Decision

The contract between the United States and the District combines in one document the functions of a water storage contract, pursuant to § 5 of the Project Act, and a repayment contract, pursuant to § 4(b).

Negotiation of the contract providing for the construction of the All-American Canal commenced in 1930. During this negotiation, the District took the position that it would not contract with the United States for construction of the All-American Canal and repayment of the costs thereof if delivery of water from the canal would be limited to any maximum acreage in single ownership. Thus, while an early draft of the contract would have limited deliveries of water to 160 acres per landowner, the contract as finally executed contained no acreage limitation provision as to privately owned lands.

Following signature of the contract and approval by the District's electors, the District instituted an in rem proceeding, *Hewes* v. *All Persons*, in the Superior Court of California to validate the contract as required

by 43 U.S.C. § 511, by state law, and by Article 31 of the contract. One of the defendants in the validation proceedings, an owner of more than 160 acres named Charles Malan, filed an answer attacking the validity of the contract on the ground that it would make the acreage limitation provisions of the reclamation law applicable to deliveries of water from the All-American Canal, and would thereby deprive him of the right to receive water for his lands in excess of 160 acres. In response to Malan's claim, Secretary Wilbur, who signed the 1932 contract on behalf of the United States. issued a letter-ruling that the acreage limitation provisions of the reclamation law were not applicable to privately owned lands in the District. App. 213a. On July 5, 1933, following the Secretary's ruling, judgment was entered in the Hewes case confirming the legality of the contract. App. 150a. In reaching its ultimate holding that the contract was valid, the court held that neither the contract nor any applicable law required that water deliveries to private lands within the District be limited to any maximum acreage held in single ownership.

Construction of the All-American Canal commenced on August 8, 1934, with funds allocated by Secretary Harold L. Ickes, who was also Public Works Administrator. The first official delivery of water through the canal to the District occurred on October 13, 1940. The District's entire supply of irrigation water has been transported by the Canal since March of 1942.

From 1933 until 1964, the Department of the Interior consistently adhered to Secretary Wilbur's ruling that the 160-acre limitation did not apply to privately owned lands in the District.¹⁶ During this period, Congress was kept advised of the fact that the 160-acre limitation was not being applied in the District. Yet Congress appropriated large amounts for construction of the project each year from 1936 through 1950. Moreover, Congress on three occasions has amended or supplemented the Project Act, and on none of these occasions did it insert an acreage limitation provision in the Act.

On December 31, 1964, Frank J. Barry, then Solicitor of the Department of the Interior, issued an opinion that purported to reverse Secretary Wilbur's ruling of 1933. Con. Apx. 182a. Barry's opinion reasoned that the 160-acre limitation of the reclamation law was applicable to the District because § 14 of the Project Act incorporates the reclamation law.

Subsequent to the Barry opinion, the Department of the Interior for several months attempted to negotiate a new contract with the District which would have incorporated the 160-acre limitation. When the District refused to negotiate a new contract, insisting on its rights under the existing contract, the United States brought this action for declaratory relief.

SUMMARY OF ARGUMENT

I

The opinion in Arizona v. California construed the Project Act as excluding water rights perfected under state law prior to the effective date of that Act from the powers vested in the Secretary to allocate the use

¹⁶ The District Court noted that the Wilbur ruling had been adhered to by six subsequent Secretaries in four Presidential administrations. 322 F.Supp. at 26, n.30.

of water stored by Hoover Dam. Indeed, it said that the Act "fettered" his powers in that respect. 373 U.S., at 581. It read the Act as requiring the delivery of stored water to satisfy those rights, saying:

"One of the most significant limitations in the Act is that the Secretary is required to satisfy present perfected rights, a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective." *Id.*, at 584.

The Court's 1979 decree recognized the fact that, prior to the authorization of the Boulder Canyon Project, pioneer settlers in the Imperial Valley in the period 1901-1929 had succeeded in diverting 2,600,000 acre feet of water annually from the Colorado River to irrigate 424,145 acres, by means of the privately owned Alamo Canal. All of the lands involved in this controversy are part of that 424,145 acres.

But if the opinion of the Court of Appeals is given effect, notwithstanding the opinion and decrees of this Court in Arizona v. California, the Secretary will deliver much less than the decreed quantity of 2,600,000 acre feet annually, to irrigate much less than the decreed area of 424,145 acres. This is because (if the court's figures are right) 233,000 acres of the decreed area will be ineligible to receive water unless the owners thereof agree to sell the excess lands at less than market value at prices fixed by the Secretary. The Court of Appeals concedes that the Secretary cannot compel them to sell, but thinks that some will do so.

The Court of Appeals argues that the District, not the landowners, owns the decreed present perfected rights, and, therefore, the District can "redistribute"

the water that is taken away from excess lands. This contention is quite untenable, both factually and legally. The fact is that all lawfully irrigable land in the District is now receiving water. There is no place within the District to put the water withheld from excess lands. Moreover, as a matter of California law. the District is merely the trustee of water rights for the landowners, who are the beneficial owners, and their beneficial interest is a constitutionally protected property right which is appurtenant to the land irrigated. Section 6 directs that these rights be satisfied; there is no authority for taking them. As a matter of federal law, § 8 of the Reclamation Act of 1902 stipulates that rights to use of water supplied through federal works shall be appurtenant to the land irrigated, and § 13(d) of the Project Act prescribes that the "covenants" in § 13(c) (which subject all rights of the United States and water users to the Colorado River compact) shall "run with the land." This includes, by definition, the Compact term "present perfected rights," as adopted by the Project Act.

The Court of Appeals' holding hinges entirely on § 14 of the Project Act, which provides that the Act shall be deemed a supplement to the reclamation law, "which said reclamation laws shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided (emphasis added)." The Court ignored the exception. The specific requirement of § 6, which mandates the satisfaction of present perfected rights, controls the general reference to the reclamation law in § 14. The only land limitation appearing in the Project Act is in § 9, which is specifically limited to desert public lands. The legislative history of the Proj-

ect Act shows six efforts, at a time when the § 14 language was in the bill, to impose acreage limitations on private lands, even though previously irrigated. All of these efforts were eventually unsuccessful. And if § 14, standing alone, imported into the Project Act the acreage limitation provisions of the reclamation law, of course the proposed restrictions, as well as § 9, which imposed acreage limitations on public lands opened for entry, would have been surplusage. Moreover, the legislative history does not contain a single statement to the effect that § 14 authorizes acreage limitations.

The District Court, in construing the relative effect to be given §§ 6 and 14 of the Project Act, gave primacy to § 6. It said:

"Under the decree in Arizona v. California construing the Project Act, the application of a specific quantity of water to a defined area of land is an essential element of a perfected right. It was held in the court's opinion that the Secretary is required to satisfy present perfected rights. This duty of the Secretary to supply water to an area where present perfected rights exist is repugnant to the concept that the United States may at the same time shut off water deliveries destined for lands, be they excess or not, entitled to the beneficial use of Colorado River water in the exercise of these rights (footnote omitted). 322 F.Supp., at 18.

"The combined effect of §§ 6, 8(a) and 13 of the Project Act is to express Congressional intent that the present perfected rights be protected from interference by any contrary provision of the Project Act or reclamation law. The specific and repeated guarantees found in these sections indicate that any provision such as acreage limitation which would curtail such rights would be detailed in correspondingly exact language. Neither the references to reclamation law contained in §§ 1, 4(b), 12 and 14 of the Project Act, nor any other term thereof demonstrate Congressional intention that acreage limitation[s] apply to privately owned lands in the District." 322 F.Supp. at 18-19.

In holding that the Project Act authorizes acreage limitations, the Court of Appeals relied heavily on this Court's opinion in Ivanhoe Irrigation District v. Mc-Cracken, 357 U.S. 275 (1958), which held that acreage limitations were required by the various acts authorizing the Central Valley Project in California. The Court of Appeals' reliance on Ivanhoe, as though that case were authority for the curtailment of present perfected rights by subsequent imposition of acreage limitations, is misplaced in four essential respects: (i) Ivanhoe did not involve the Project Act; (ii) the landowners in Ivanhoe did not have vested water rights; (iii) in Ivanhoe the statute did not require the satisfaction of vested or perfected rights; and (iv) in Ivanhoe the district and the Secretary agreed that acreage limitations applied and the contract so provided, whereas here the District and the Secretary agreed that acreage limitations did not apply, and the contract did not contain an acreage limitation provision. Moreover, the dictum in Ivanhoe, relied on by the Court of Appeals in this case, to the effect that the operation of § 8 of the Reclamation Act of 1902 is limited to the acquisition of water rights and does not extend to operation of the dam, was recently disayowed by this Court in California v. United States, 438 U.S. 645, 674-75 (1979).

Principles of finality require that the decision not to apply acreage limitations to the District be recognized as irreversible.

Article VIII of the Compact and the Project Act required the Secretary to make a number of decisions in carrying out the intent of Congress. Among others, he relocated Hoover Dam to Black Canyon rather than Boulder Canyon, and he determined that the acreage limitations should not apply within the District. Hoover Dam will remain in Black Canyon and acreage limitations should not now apply in the District.

Every available legal device was used to make these decisions final for all time.

The regulations of the Department of the Interior, in force since 1910, permitted water to pass through works constructed by the United States to satisfy vested rights for ownership in excess of 160 acres. Those regulations are still in effect.

The Secretary contracted with the District in an attempt to make clear what the rights and obligations of the parties were. The contract was for permanent service as required by the Project Act and the parties agreed that the contract did not require an acreage limitation.

The Court of Appeals' decision failed to give full faith and credit, required by 16 U.S.C. § 1738, to a 1933 judgment of a State court of competent jurisdiction, in proceedings required by 43 U.S.C. § 511, to validate the contract between the United States and the District, whereby the United States agreed to deliver water through the All-American Canal, and the District agreed to repay the cost of that canal. The

contract required this validation proceeding, repeating the language of 43 U.S.C. § 511. The State Court, deciding pleaded adversary issues, held that neither the Project Act nor the contract required acreage limitations on private lands in Imperial Valley, and that the contract was valid. The Department acquiesced in the judgment, and submitted the contract to Congress as conforming to § 4(b) of the Project Act, which required assurance of the repayment of the government's investment, as a precondition to the appropriation of funds for construction. The appropriations were made.

The validation decree, after it became final, was thus accepted by the Secretary and by Congress as the trigger to proceed with and finalize the project.

For more than 30 years the District relied on the repeated and explicit understanding that acreage limitations did not apply within its boundaries.

Ш

The Court of Appeals' opinions would extend the concept of standing on an unjustifiable scale. This is not a class action. There is no allegation of an injury to a particular respondent, as distinguished from the public in general, caused by any party to this action, which a judgment in this suit could redress. Respondents do not allege, and could not allege, any preference against other potential purchasers of excess lands dwelling anywhere in the United States. Even if the Secretary should be held to possess the power to refuse delivery of water to excess lands possessing present perfected rights unless and until the owners

authorize him to sell those lands at below-market prices fixed by the Secretary, there is no assurance at all that any landowner, if he decided to sell at the Secretary's price, would choose to sell to these particular respondents. The Secretary cannot compel landowners to sell, and cannot choose the buyers if sales are made. Dr. Yellen, et al., are merely members of the general public, seeking to second-guess the Solicitor General of the United States in his perception of the merits of the case, after he had withdrawn the United States from it.

This action was brought under § 46 of the Omnibus Adjustment Act of 1926, which provides that "until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior . . . (emphasis added)."

The event which terminated the Secretary's authority occurred on March 1, 1978, when the District completed repayment of more than one-half of the construction charges against all lands in the District. App. 243a. The Court of Appeals, in its opinion on rehearing, acknowledged the occurrence of this event but held that the Secretary's authority continues "regardless of the fact that construction charges for the irrigation project have been repaid." 595 F.2d, at 527. The only authority cited by the court for this statement was its own decision in *United States* v. *Tulare Lake Canal Company*, 535 F.2d 1093, cert. denied 429 U.S.

¹⁷ To the contrary, the proposed regulations publish 1 by the Department on August 22, 1977, construe § 46 of the 1926 Act as only requiring price approval until one-half of the total construction costs allocated to irrigation have been paid. § 426.9, App. 236a; § 426.10, App. 237a.

1121 (1977). It went on to say "[t]his decision expressly applies to all federal reclamation projects subject to Section 46." *Ibid*. The holding in the present case is in flat contradiction of the statute. To the extent that the holding by the Court of Appeals in the *Tulare* case supports its holding here, we respectfully suggest that the *Tulare* decision should be disavowed by the Supreme Court.

ARGUMENT

I.

The Boulder Canyon Project Act Does Not Authorize Acreage Limitations On Present Perfected Rights

- A. The plain language of the Project Act specifically requires the satisfaction of present perfected rights
- 1. The § 6 Requirement That Present Perfected Rights Be Satisfied

Section 6 of the Project Act expressly requires that the Boulder Canyon Project be operated so as to satisfy "present perfected rights":

"The dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power."

As will be shown, this explicit provision, as construed in *Arizona* v. *California*, cannot be given effect if the Project Act is construed to imply authority to limit water deliveries on private lands in the District to 160 acres per landowner.

The term "present perfected rights" is not defined in the Project Act, but has been defined by this Court as follows:

- "(G) 'Perfected right' means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use;
- "(H) 'Present perfected rights' means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act...' Arizona v. California, 376 U.S. 340, 341 (decree) (1964).

The concept of "present perfected rights" had its origins in Article VIII of the Colorado River Compact:

- "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.
- "All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate."

Although the Article VIII requirement that present perfected rights not be impaired applies to all seven of the Basin States, Article VIII was drafted specifically to protect landowners in Imperial Valley. Delph Carpenter, one of the authors of the Compact, testified as follows:

"During the deliberations of the Colorado River Commission in Santa Fe, and after 10 days' work, a sketch or outline of the progress was released to the press, stating what had happened and the proposed terms of a treaty.... The Imperial Valley representatives were immediately responsive. They came before the Commission and presented their claims with great vigor....

"In view of that claim, coming as it did from people who cultivated upward of half a million acres of very valuable land, Article VIII of the Compact was drawn at the last session of the proceedings." Hearings Pursuant to S. Res. 320, Sen. Comm. on Irr. & Recl., 68th Cong., 2d Sess., at p. 678 (1925).

The term "present perfected rights" appears in both the Project Act (§ 6) and the Colorado River Basin Project Act (§ 301(b)), 82 Stat. 886, 43 U.S.C. §§ 1501 et seq., where it is used to limit the Secretary's discretion to allocate waters between states and to deliver waters within individual states. And it appears in this Court's opinion and decrees in Arizona v. California, which construed the Project Act's allocation of mainstream water among the three Lower States (Arizona, California and Nevada) and adjudicated present perfected rights within those states. Expressed in terms of acre-feet of diversions 18 annually, present perfected

¹⁸ 373 U.S. 546 (opinion) (1963); 376 U.S. 340 (decree) (1964); 439 U.S. 419 (supplemental decree) (1979).

¹⁹ For purposes of illustrating the magnitude of the present perfected rights decreed in the Lower Basin states, we have shown

rights in the Lower States as decreed by this Court are as follows:

Arizona	1,059,565
California	2,99 4,451
Nevada	13,034

The importance of the District's present perfected rights to the scheme of the Compact and the Project Act is evident from their magnitude: 2,600,000 acrefect of diversions annually—64 percent of the total present perfected rights decreed by this Court, and 59 percent of the 4,400,000 acrefect of consumptive use apportioned to California of the first 7,500,000 acrefect available.

The requirement of the Project Act that present perfected rights be satisfied is not limited to interbasin or even interstate allocations; it extends to intrastate deliveries of water from the Boulder Canyon Project. Thus, this Court in Arizona v. California decreed 2,600,000 acre-feet of annual diversions, not to the Lower Basin and not to California, but to the District. Section 13(d) of the Project Act, in providing that conditions and covenants subjecting water deliveries to the Compact shall be for the benefit of the states "and the users of water therein," in effect requires that the rights assured by the Compact, including present perfected rights, attach to intrastate deliveries of water. In Arizona v. California, this Court, in four separate places in its opinion and original decree, con-

these rights only in terms of acre-feet of diversions. For the alternative expressions of the decreed rights (i.e., quantities of water necessary to irrigate stated amounts of acreage), where applicable, the Court is referred to its decrees at 376 U.S. 340 (1964) and 439 U.S. 419 (1979).

firmed that the § 6 requirement that present perfected rights be satisfied applies to such intrastate deliveries. In its opinion, the Court said:

- "... Congress intended the Secretary of the Interior, through his § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water.[20]
- ... Significantly, no phrase or provision indicating that the Secretary's contract power was to be controlled by the law of prior appropriation was substituted either then or at any other time before passage of the Act, and we are persuaded that had Congress intended so to fetter the Secretary's discretion, it would have done so in clear and unequivocal terms, as it did in recognizing 'present perfected rights' in § 6.
- "The argument that Congress would not have delegated to the Secretary so much power to apportion and distribute the water overlooks the ways in which his power is limited and channeled by standards in the Project Act. . . . One of the most significant limitations in the Act is that the Secretary is required to satisfy present perfected rights, a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective. § 6.
- "... It will be time enough for the Courts to intervene when and if the Secretary, in making apportionments or contracts, deviates from the stand-

²⁰ Our footnote: the disavowal of the foregoing dictum in *California* v. *United States*, 438 U.S. 645, 674 (1978), reinforces the argument that Congress did not authorize the Secretary to impair rights previously perfected under state law by prohibiting delivery of water to areas theretofore served under those rights.

ards Congress has set for him to follow, including his obligation to respect 'present perfected rights' as of the date the Act was passed (emphasis added)." 373 U.S., at 580-581, 583-584, 594.

The Court made the point again in its 1964 decree:

"If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,000 acre-feet in the aforesaid three States, then the Secretary of the Interior, after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines... may apportion the amount remaining... (emphasis added)." 376 U.S., at 342.

In other words, the Secretary's authority under § 5 of the Project Act to determine which users within each state shall get water and to contract with such users is limited by the § 6 requirement that present perfected rights within each state be satisfied.

2. The Incompatibility of § 6 and Acreage Limitations

While § 9 of the Project Act expressly limits entries on public lands (on which there are no present perfected rights) to 160 acres, the Act makes no mention whatever of acreage limitations with respect to private lands. For this, there is good reason: the Secretary could not possibly satisfy present perfected rights as required by § 6 if he were required to limit deliveries of the water subject to such rights to 160 acres per landowner, because most of the District's present perfected rights were perfected on—and have always been used on—excess lands, to which such rights are appurtenant.

Although there is no specific provision in the Project Act which requires the application of acreage limitations to private lands, the Court of Appeals inferred such a requirement from § 14 which provides:

"This act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided."

Since the "reclamation law" includes § 5 of the Reclamation Act of 1902 and § 46 of the Omnibus Adjustment Act of 1926-both of which contain acreage limitation provisions—the Court of Appeals reasoned that § 14 of the Project Act by implication requires that deliveries of water to private lands be limited to 160 acres per landowner. The court reconciled this reasoning with the explicit § 6 requirement that present perfected rights be satisfied on the ground that the District, rather than the landowners, is the owner of the present perfected rights. From this premise, the court concluded that the Secretary could satisfy § 6 by delivering all of the water subject to the District's present perfected rights to the District, and that the District could then withhold water from excess lands and redistribute it to non-excess lands without impairing present perfected rights. 559 F.2d, at 529-30. This conclusion is wrong for reasons both practical and legal.

First, as to the practical impossibility of what the Court of Appeals has proposed: there is simply no place within the District to put the water which the Court of Appeals would have the District withhold from excess lands and redistribute. All lawfully irri-

gable private land—some 438,000 acres—is already under irrigation (424,145 acres of this is in decreed present perfected rights). Thus, as a practical matter, it is physically impossible to redistribute water within the District.

Second, as to the legal impossibility of redistributing water subject to present perfected rights: by definition, a present perfected right is a right "acquired in accordance with state law . . . by the actual diversion of a specific quantity of water that has been applied to a defined area of land . . ." prior to the effective date of the Project Act.21 Thus, the attributes of present perfected rights are defined by state law and are identical to the attributes of other perfected appropriative water rights in the particular state except that the right must have existed as of June 25, 1929, and is recognized only to the extent that water had been put to use by that date. Under California law, (i) the landowners within an irrigation district are the equitable owners of the water rights-including present perfected rights-held by the district, and have a constitutionally protected interest therein, and (ii) water rights-including present perfected rights-are appur-

²¹ The significance of state law is confirmed by § 18 of the Project Act which provides:

[&]quot;Sec. 18. [Rights of States to waters within their borders.]
—Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement."

For the relation of this section to present perfected rights, see the opinion in *Arizona* v. *California*, 373 U.S., at 588. Section 18 was reenacted in 1940 as § 14 of the Boulder Canyon Project Adjustment Act, 54 Stat. 779, 43 U.S.C. § 618m.

tenant to the land on which the water is used. Both of these aspects of a present perfected right would necessarily be impaired if the Secretary or the District were to withhold water subject to such rights from excess lands within the District's boundaries.

First, as to the ownership aspect of a present perfected right: California law as articulated by the California Supreme Court is to the effect that the district holds the rights in trust for the landowners:

"[T]he beneficiaries of the trust, who, upon familiar equitable principles, are to be regarded as the owners of the property, are the landowners in the district, with whose funds the property has been acquired (Civ. Code, § 853), and in whom, indeed, is vested by the express provisions of the statute, in each, the right to the several use of a definite proportion of the water of the district, and in all, in common, the equitable ownership of its water rights, reservoirs, ditches, and property generally, as the means of supplying water. St. 1887, pp. 34, 35, §§ 11, 13. Such rights as these cannot be distinguished in any way from other private rights, and therefore clearly come within the protection of the provision of section 13 of article 1 of the state Constitution—that 'no person shall be ... deprived of ... property without due process of law,' and of the similar provision of section 1 of the fourteenth amendment to the Constitution of the United States." Merchants' National Bank of San Diego v. Escondido Irrigation District, 144 Cal. 329, 334, 77 P. 937, 939 (1904).

Thus, the equitable ownership of the present perfected rights which the Secretary must satisfy under § 6 of the Act is vested in the landowners, not in the District. And the landowner consequently has a statu-

tory right to use a definite, proportional share of the water distributed by the district:

"Basis of apportionment among landowners. All water distributed by districts for irrigation purposes shall except when otherwise provided in this article be apportioned ratably to each landowner upon the basis of the ratio which the last assessment against his land for district purposes bears to the whole sum assessed in the district for district purposes." Cal. Water Code Ann. § 22250 (West 1971).

This right may be assigned, not by the District, but by the individual landowner:

"Assignment of right. Any landowner may assign for use within the district his right to the whole or any portion of the water apportioned to him pursuant to Section 22250." Id., at § 22251.

Second, the present perfected right is appurtenant to the land on which the water is used. As Hutchins has written:

"The concept of appurtenance of an appropriative right to the land on or in connection with which the water is used received early acceptance in California." 1 W. Hutchins, Water Rights in the Nineteen Western States 454 (1971).

The concept of appurtenance is enshrined in the California Civil Code ²² and has been confirmed by Cali-

²² The California Civil Code provides:

[&]quot;A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another." Cal. Civ. Code, § 662.

fornia courts on a number of occasions. See, e.g., Palmer v. Railroad Commission, 167 Cal. 163, 173, 138 P. 997, 1001 (1914); Stanislaus Water Co. v. Bachman, 152 Cal. 716, 724, 93 P. 858, 862 (1908); Senior v. Anderson, 138 Cal. 716, 723, 72 P. 349, 351 (1903).

The concept of appurtenance is also found in the Project Act. Section 13(d) in effect provides that rights assured by the Colorado River Compact (such as present perfected rights) "run with the land," and "shall be deemed to be for the benefit of and be available to" the states of the Basin and "the users of the water therein... by way of suit, defense, or otherwise, in any litigation respecting the waters of the Colorado River...." ²³ And § 14, which incorporates the reclamation law "except as otherwise herein provided," presumably incorporates § 8 of the Reclamation Act of 1902, which provides:

"[T]he right to the use of water . . . shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

Mr. Justice Harlan called attention to this, dissenting in Arizona v. California, 373 U.S. 546, 623 (1963).

It is true that, under California law, an appropriative water right may be severed from the land. See, e.g., Wright v. Best, 19 Cal.2d 368, 380, 121 P.2d 702, 709 (1942). However, this Court, in Ickes v. Fox, 300 U.S. 82 (1937), rejected the notion that an appropriative right may be severed by the trustee rather than the equitable owner. In Ickes, the United States was the appropriator and legal owner of the water right, as the

²³ This provision was re-enacted in the Boulder Canyon Project Adjustment Act, 54 Stat. 779, § 14.

District is here. The United States diverted, stored and distributed the water for use by others, just as the District does here. Nevertheless, this Court held that the water rights were appurtenant to the land and were enforceable by the landowner, not the trustee. See, on remand, Ickes v. Fox, 137 F.2d 30 (D.C. Cir. 1943).

From all this it follows that, if water is withheld from excess lands in the District, as required by the Court of Appeals' decision, the equitable owners of present perfected rights will be denied the use of the water subject to those rights, as will the lands to which the rights are appurtenant. A more obvious impairment of present perfected rights, violating Article VIII of the Compact—and a more obvious failure to satisfy such rights, violating § 6 of the Project Act—is difficult to imagine.

Judge Turrentine put it this way:

"This duty of the Secretary to supply water to an area where present perfected rights exist is repugnant to the concept that the United States may at the same time shut off water deliveries destined for lands, be they excess or not, entitled to the beneficial use of Colorado River water in the exercise of these rights." 322 F.Supp., at 18.

Since it is apparent that the Secretary cannot satisfy present perfected rights and impose acreage limitations within the District, the plain language of § 14—"except as otherwise herein provided"—must mean that the acreage limitation provisions of the reclamation law are not incorporated by § 14. This interpretation finds support in the well-settled rule of statutory construction that:

"An interpretation of the statute which would ... render different sections inconsistent with each

other, cannot be the true one." Perrine v. Chesapeake & D. Canal Co., 50 U.S. [9 How.] 172, 187 (1850).

Also, because § 6 is a specific provision, and § 14 is a general provision, a construction which in effect makes § 14 override § 6 violates the related rule that:

"[S]pecial provisions prevail over general ones which, in the absence of the special provisions, would control." *Missouri* v. *Ross*, 299 U.S. 72, 76 (1936).

In holding that the Project Act authorizes acreage limitations, the Court of Appeals relied heavily on this Court's opinion in Ivanhoe Irrigation District v. Mc-Cracken, 357 U.S. 275 (1958), which held that acreage limitations were required by the various acts authorizing the Central Valley Project in California. The Court of Appeals' reliance on Ivanhoe, as though that case were authority for the curtailment of present perfected rights by subsequent imposition of acreage limitations, is misplaced in four essential respects: (i) Ivanhoe did not involve the Project Act; (ii) In Ivanhoe, as the Court said, "It is interesting to note that irrigators in this district receive water diverted from the San Joaquin in which they never had nor were able to obtain any water right." 357 U.S., at 285. Here, the water rights which would be impaired are not only vested under state law, but have been perfected by actual use, thus meeting the federal statute's definition of present perfected rights. (iii) In Ivanhoe, the federal statute was construed as authorizing the federal taking of state-generated water rights. Here, the statute directs that such rights be satisfied, not taken. (iv) In Ivanhoe, the district agreed

that the acreage limitation should apply, the contract so stated, and the voters authorized the contract on that understanding. Here, the reverse is true. Court of Appeals, 559 F.2d, at 37, relies upon a dictum in *Ivanhoe* which attributes § 8 of the Reclamation Act of 1902 only a restricted mandate to recognize state law in the acquisition of water rights, not in the operation of a dam, a dictum which this Court, in *California* v. *United States*, 438 U.S. 645, 674-75 (1979), said "went further than was necessary" in restricting the scope of that section. In any event, that dictum in *Ivanhoe* is inoperative here: § 6 of the Project Act unquestionably controls the Secretary in the operation of the dam and reservoir, directing that they shall be so operated as to satisfy rights theretofore perfected under state law.

B. The legislative history of the Boulder Canyon Project Act confirms that § 14 was not intended to imply an authority to limit water deliveries to 160 acres of private land in single ownership

The legislative history of the Project Act spanned a period of some 10 years. During that time, the subject of acreage limitations was thoroughly debated in the committees and on the floors of Congress. Bills which contained the same limited incorporation of the reclamation law (i.e., "except as otherwise herein provided") that appears in § 14 of the Project Act were repeatedly attacked by proponents of acreage limitations on the ground that these bills did not limit deliveries of water on private lands to a maximum of

The first "Kettner Bill," H.R. 6044, authorizing construction of a canal connecting the District's irrigation system to Laguna Dam, was introduced on June 17, 1919. The Project Act was signed into law by President Coolidge December 21, 1928, and became effective June 25, 1929.

160 acres per landowner. Various amendments were proposed to provide for acreage limitations, and the first bill to pass the House contained such an amendment. But, in the end, Congress elected not to limit water deliveries from the project on private lands to 160 acres, and the bill passed by both houses and signed by the President contained no acreage limitation provision, except as to public lands.

The bills that ultimately passed the House and Senate in 1928 were the fourth in a series of bills introduced by Congressman Swing and Senator Johnson of California.²⁵ The provisions of § 14 of the Project Act originated in the third set of Swing-Johnson bills. These bills provided:

"This act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided."

As introduced, the third Swing-Johnson bills did not contain express acreage limitation provisions. These bills were referred to the Department of the Interior

²⁵ The first Swing-Johnson bills were S. 3511, 67th Cong., 2d Sess., 62 Cong. Rec. 5929 (April 25, 1922), and H.R. 11449, 67th Cong., 2d Sess., 62 Cong. Rec. 5985 (April 25, 1922); the second Swing-Johnson bills were S. 727, 68th Cong., 1st Sess., 65 Cong. Rec. 146 (Dec. 10, 1923), and H.R. 2903, 68th Cong., 1st Sess., 65 Cong. Rec. 217 (Dec. 10, 1923); the third Swing-Johnson bills comprised S. 1868, 69th Cong., 1st Sess., 67 Cong. Rec. 1232 (Dec. 21, 1925), H.R. 6251, 69th Cong., 1st Sess., 67 Cong. Rec. 1313 (Dec. 21, 1925), S. 3331, 69th Cong., 1st Sess., 67 Cong. Rec. — (Feb. 27, 1926); and H.R. 9826, 69th Cong., 1st Sess., 67 Cong. Rec. 4730 (Feb. 27, 1926); and the fourth Swing-Johnson bills were S. 728, 70th Cong., 1st Sess., 69 Cong. Rec. 341 (Dec. 9, 1927), and H.R. 5773, 70th Cong., 1st Sess., 69 Cong. Rec. 97 (Dec. 5, 1927).

for comments. Secretary Hubert Work submitted comments and suggested amendments in a letter dated January 12, 1926. Colorado River Basin: Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation, 69th Cong., 1st Sess., pt. 1, 5-9 (1926). Secretary Work did not recommend an amendment to expressly require acreage limitations on private lands.

Congressman Swing redrafted his bill to reflect the Interior Department's comments and proposed amendments as contained in Secretary Work's letter, and reintroduced the bill as H.R. 9826. H.R. 9826 contained the limited incorporation of the reclamation law quoted above (which appears verbatim in § 14 of the Project Act), but no express acreage limitation. Dr. Elwood Mead, Commissioner of Reclamation, then appeared before the House Committee on Irrigation and Reclamation to explain the Interior Department's views on the bill. Dr. Mead and Congressman Swing both testified that there was no provision in H.R. 9826 which would impose acreage limitations on lands receiving water from facilities authorized by the act:

"MR. SINNOTT. I would like to ask the doctor is there any provision in the bill sponsored by the Secretary of a farm unit on the lands to be irrigated?

"Doctor Mead. This bill does not go beyond the provisions for three things. One is the dam—the reservoir—and the second is the power plant, and the third is the all-American canal. That is all it deals with. It does not deal with irrigation of new lands at all.

"THE CHAIRMAN. That is reserved for future legislation?

[&]quot;DR. MEAD. Yes, sir.

- "MR. SINNOTT. But as to the old land-
- "Doctor Mead. As to the old land, it would be sold water under a Warren contract.
- "Mr. Sinnott. The present owner can occupy his present farm unit?"
 - "DOCTOR MEAD. Yes, sir.
 - "Mr. SINNOTT. No matter what that might be?
 - "DOCTOR MEAD. Yes.
- "Mr. Sinnott. What is that now in the Imperial Valley?
- "DOCTOR MEAD. Of course, it varies widely. There is not any law. There are a good many large holdings there.
- "THE CHAIRMAN. How was the title acquired to these large holdings? Was it acquired from the railroads?
- "Doctor Mead. I think in the first place the title was acquired in 640-acre tracts.
- "Mr. Swing. That is the maximum under which title was acquired.
- "Mr. Sinnott. There is nothing in this bill requiring the landowner to sell the surplus over a farm unit of 160 acres at a price to be fixed by the Secretary, as is now in the present reclamation law?
 - "Mr. Swing. No, sir." Id., at 32-33.

It is to be emphasized that the bill of which Dr. Mead and Congressman Swing were speaking contained the very same provision which the Court of Appeals held to require acreage limitations in the District. Thus, the Court of Appeals' interpretation of § 14 is flatly contradicted by the author of that

provision (Congressman Swing) and by the agency responsible for reviewing it (the Department of the Interior). Moreover, no one suggested in the House proceedings that the § 14 language authorized acreage limitations on private lands.

After completion of the hearings on H.R. 9826, the House Committee on Irrigation and Reclamation amended the bill to include an express acreage limitation provision.²⁶ The committee reported H.R. 9826, as amended, favorably, but the bill did not come up for a vote on the House floor.

On the Senate side, S. 3331 was referred to the Committee on Irrigation and Reclamation, which reported the bill favorably with the limited incorporation of the reclamation law now appearing in § 14, but without an express acreage limitation provision other than that imposed by § 9 on desert public lands.

During debates on the Senate floor, Senator Phipps offered an amendment to § 5 of the bill, generally similar to that adopted by the House Committee, which would have specifically limited deliveries of water on

private lands to 160 acres. 68 Cong. Rec. 4766 (1927). Senator Phipps also offered a substitute bill which contained (i) an express acreage limitation identical to that contained in his proposed amendment, and (ii) the limited incorporation of the reclamation law which originated in the third Swing-Johnson bills and was ultimately carried forward verbatim into § 14 of the Project Act. Id. at 4764. Neither Senator Phipps' amendment to § 5 nor his substitute bill was adopted. Again, no one suggested that the result sought by Senator Phipps—i.e., the application of acreage limitations to private lands—could be achieved through the language in § 14.

The fourth Swing-Johnson bills, H.R. 5773 and S. 728, were introduced in the first session of the 70th Congress. Again, both bills contained the § 14 language incorporating the reclamation law "except as otherwise herein provided." H.R. 5773, as introduced, contained the acreage limitation provision that had been added to the third Swing-Johnson bill by the House Committee on Irrigation and Reclamation (for the

²⁷ Senator Phipps' proposed amendment to § 5 of S. 3331 provided:

[&]quot;(b) All contracts for the delivery of water for irrigation purposes shall provide that all irrigable land held in private ownership by any one owner in excess of 160 acres shall be appraised in a manner to be prescribed by the Secretary of the Interior, and the sale prices thereof fixed by the said Secretary on the basis of its actual bona fide value at the date of appraisal, without reference to the proposed construction of any irrigation works under the provisions of this act; and that no such excess lands so held shall receive water if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior. Contracts respecting water for irrigation and domestic uses shall be for permanent service."

text of this provision, see n.26, supra at 42). S. 728, as introduced, contained no such provision. It was referred to the Senate Committee on Irrigation and Reclamation, where Senator Ashurst proposed an amendment that would have added the acreage limitation provision contained in the House bill. Senator Ashurst explained his amendment as follows:

"I offered an amendment before the committee that would subject the privately owned lands to the same conditions as lands in other irrigation projects privately owned, so that no water user might secure water for land in excess of 160 acres." S. Rep. No. 592, 70th Cong., 1st Sess., Part 2 at 26 (1928).

In addition, Senator Phipps, chairman of the committee, introduced his own bill, S. 1274, which was substantively identical to S. 728 except that it contained an express acreage limitation provision in addition to the § 14 language. The committee considered S. 728 and S. 1274 together. It did not adopt Senator Ashurst's acreage limitation amendment, nor did it report the chairman's bill, S. 1274, with the acreage limitation provision. Instead, the Committee reported S. 728 without an acreage limitation, other than the present § 9 provision as to public lands, and recommended passage.

²⁸ Colorado River Basin: Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation, 70th Cong., 1st Sess. 2-3 (1928). The acreage limitation provision proposed by Senator Phipps in § 5(b) of S. 1274 was identical to the amendment to § 5 of S. 3331 which Senator Phipps proposed unsuccessfully in the previous Congress, and which is reproduced supra in n.27.

When S. 728 reached the Senate floor, the proponents of acreage limitations renewed their attacks on the bill and their efforts to amend it. Senator Hayden proposed an amendment to S. 728 on the Senate floor, identical with that appearing in H.R. 5773 (see n.26, supra.).

In explaining this amendment on the Senate floor, Senator Hayden brought to the attention of his colleagues the existence of such a provision in the House bill:

"We find that in the companion bill to the measure now under consideration by the Senate that the House Committee on Irrigation and Reclamation has included a provision limiting the area in individual ownership to 160 acres. I have, therefore, rather than copy the law as enacted with respect to the San Carlos project in Arizona, taken from the House bill the language of an amendment which I now offer" 69 Cong. Rec. 9451.

The Senate did not adopt Senator Hayden's amendment. As the debates continued, Senator Ashurst assailed the absence of an acreage limitation provision in the bill, 69 Cong. Rec. 10471, and reminded the Senate that he had unsuccessfully proposed an amendment authorizing acreage limitations in committee. *Id.*, at 10495. In the closing days of debate on S. 728, Senator Ashurst stated that he objected to the bill because:

"[T]he bill authorizes the expenditure of millions of dollars of Federal funds to irrigate lands owned largely by private-land speculators in California in units in excess of 160 acres." 70 Cong. Rec. 289 (1928).

At no time during the debate did any member of the Senate suggest that the § 14 language, which appeared

in the bill, would authorize acreage limitations and thereby dispense with the need for an amendment of the kind proposed by Senators Ashurst, Hayden and Phipps. The Senate passed S. 728 without an acreage limitation provision (other than § 9) on December 14, 1928. Id., at 603. The House passed the Senate version on December 18, 1928, id., at 838, and President Coolidge signed the bill into law on December 21, 1928.

It is to be emphasized again that all of the above-described efforts to include an acreage limitation in the Project Act—both in the House and in the Senate—were directed to bills which contained language identical to that of § 14 of the Project Act. If § 14 implicitly imposes acreage limitations, as the Court of Appeals held, all of these efforts would have been superfluous. Yet not one statement appears anywhere in the legislative history of the Project Act in either the Senate or the House to the effect that § 14 incorporates the acreage limitation provisions of the reclamation law.

C. Thirty-one years of consistent administrative construction by six secretaries confirms that the Project Act does not authorize acreage limitations in Imperial Valley

Under § 4(b) of the Project Act, before any money could be appropriated for construction of the All-American Canal, and before construction could commence, the Secretary was required to insure, by contract or otherwise, payment of construction, operation and maintenance expenses of the canal. In addition, § 5 of the Project Act authorized the Secretary to enter into contracts for the storage and delivery of water. Accordingly, as of December 1, 1932, the United States and the District entered into a contract which pro-

vided for the payment of construction costs of the All-American Canal by the District, and for delivery of the District's water through that canal. This contract made no mention of acreage limitations with respect to private lands in the Imperial Valley. It was signed on behalf of the United States by Secretary Ray Lyman Wilbur on December 1, 1932. He had approved it as to form on November 4, 1931, after a public hearing. U.S. Department of the Interior, The Hoover Dam Contracts 563 (1933).

As required by state ³⁰ and federal ³¹ law, as well as by Article 31 of the contract, ³² the contract was submitted to a state court of competent jurisdiction for a determination of its validity. Hewes v. All Persons, supra. Charles Malan, one of the parties to the validation proceeding, alleged that the contract was invalid because it would limit deliveries of water on private lands to 160 acres in single ownership. In specific response to this allegation, Secretary Wilbur issued a letter-ruling to the effect that neither the Project Act nor the contract authorized the application of acreage limitations to privately owned lands in the District:

"Early in the negotiations connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this canal. Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a

²⁹ For the text of the contract, see App. 177a.

^{30 1917} Cal. Stat. 245 and 1897 Cal. Stat. 254.

⁸¹ 42 Stat. 541, 43 U.S.C. § 511.

³² Reproduced at App. 203a.

present water right. These lands, having already a water right, are entitled to have such vested right recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas." 71 I.D., at 530.

It is significant that this construction of the Project Act and of the contract was made by the individual who negotiated and signed the contract on behalf of the United States.

If Secretary Wilbur had decided otherwise, he would have been acting in contravention of regulations, in force since 1910 (and still in force today), which say that the land limitation in § 5 "does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through the works constructed by the Government under appropriate regulations and charges." 38 L.D. 637; 43 C.F.R. 230.70; App. 216a. See discussion infra at 66-67.

Although Secretary Wilbur's ruling specifically mentioned only § 5 of the Reclamation Act, and not § 46 of the Omnibus Adjustment Act, the Department of the Interior subsequently confirmed that the ruling embraced § 46 as well. In a letter dated March 1, 1933, P. W. Dent, Assistant Commissioner and Chief Counsel of the Bureau of Reclamation, stated:

"In my view the same principle discussed in the Secretary's letter of February 24, based upon section 5 of the reclamation act, involves precisely that contained in section 46 of the act of May 25,

1926. The latter act merely ties up with and emphasizes what has always been the law in this respect.

"The Secretary's letter was directed to the specific allegations in the complaint, which, so far as could be ascertained, had no direct reference to the act of May 25, 1926. I assume, however, that regardless of the allegations in the complaint, Mr. Childers is apprehensive that argument may be submitted based upon the 1926 act. If this is done it seems to me the defense would necessarily be based upon the propositions, first, that the All-American Canal work constitutes a special project specifically authorized by the Boulder Canyon Project Act and that this stands upon a basis quite different from the ordinary conception of a project. The second proposition is that the acreage limitation in the reclamation law (including section 46 of the act of May 25, 1926) does not apply to the lands having a vested right." Con. Apx. 179a.33

Following Secretary Wilbur's ruling, the court in *Hewes* held that neither the Project Act nor the contract authorized the application of acreage limitations to privately owned lands in the District, that therefore the objections of Malan should be overruled, and that the contract was valid.

For the next 31 years, Secretary Wilbur's construction of the Project Act and of the contract was consistently adhered to by the United States. During that period, the Department of the Interior did not once refute Secretary Wilbur's ruling, and on a number

³³ This Court, in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 290 (1958), referred to § 46 of the 1926 act as a "reenactment" of § 5 of the 1902 act.

of occasions positively reaffirmed it. 322 F.Supp., at 23-27.

Secretary Wilbur was succeeded by Secretary Harold L. Ickes, who took office March 4, 1933, and served until February 15, 1946. He served simultaneously as Public Works Administrator. Secretary Ickes' interpretation of the Project Act confirmed that of Secretary Wilbur. As Secretary, Ickes could have repudiated Secretary Wilbur's ruling of February 25, 1933, that the Project Act did not authorize imposition of acreage limitations on private land in Imperial Valley. He did not. He adhered to it for the 13 years that he was in office.

Secretary Ickes' first opportunity to reverse Secretary Wilbur was in the validation proceeding on the District's contract, to which Secretary Wilbur's ruling had been transmitted. Trial commenced March 16, 1933. Judgment was not entered until July 5, 1933. Far from repudiating Secretary Wilbur's interpretation, Secretary Ickes concurred in it. As Public Works Administrator, he withheld approval of an allocation of funds to commence construction of the All-American Canal until an appeal by an excess landowner from the judgment in the Hewes case was dismissed.³⁴ When

the appeal was dismissed, in February of 1934, he proceeded to allocate funds. Between March 20, 1934, and June 22, 1936, Secretary Ickes, in his capacity as Public Works Administrator, allocated some \$22 million of P.W.A. funds for the construction of the All-American Canal, and so advised Congress. *Interior Department*

³⁴ The record in the District Court shows a protest from the attorney for the excess landowner against Secretary Ickes' insistence on dismissal of his appeal. Exhibit LX-BK.

Appropriation Bill, 1937: Hearings before Subcommittee of House Committee on Appropriations, 74th Cong., 2d Sess. 1162 (1936). After June 22, 1936, when the All-American Canal became a line item in the Interior Department's budget, until 1942, when the Canal was completed, Secretary Ickes regularly sought congressional appropriations for construction of the Canal.

Secretary Ickes, not Secretary Wilbur, executed the repayment agreement with Coachella Valley County Water District, dated October 15, 1934, covering that district's share of the cost of the All-American Canal. The Hoover Dam Documents, House Document No. 717, 80th Cong., 2d Sess., at A633. The Coachella contract did not include an acreage limitation clause. That contract's reference to the reclamation law (Art. 29) was identical with that in the Imperial contract (Art. 30).35

Secretary Ickes, throughout his 13-year term of office, was firm in his opinion that the Project Act did not impose an acreage limitation on private lands in Imperial Valley because they possessed vested rights antedating the Project Act. His appointee, Assistant Commissioner of Reclamation William E. Warne (later Assistant Secretary) so testified before congressional committees in 1944. Hearings on H.R. 3961, 78th Cong., 2d Sess., Subcommittee of Senate Committee on Commerce, pt. IV, at 599. Mr. Warne put Secretary Wil-

³⁵ An acreage limitation was first included in a Coachella contract in 1947, when the Department, acting through Secretary Krug, and Coachella entered into a contract for construction and repayment of the cost of a distribution system. U.S. Exhibit 10 in the District Court. This was the occasion of Solicitor Harper's opinion, *infra*, p. 53, n.37.

bur's letter of February 25, 1933, in the record in support of the Ickes administration's statement that acreage limitations were not applicable in Imperial Valley.³⁶

In 1941, B.P. King, an attorney in the Bureau of Reclamation, acting pursuant to instructions issued by Secretary Ickes, completed a comprehensive report entitled "The Excess Land Provisions of the Reclamation Law." This report concluded that the acreage limitation provisons of the reclamation law were not applicable to the District. 322 F.Supp. at 24.

In 1942, Commissioner Page of the Bureau of Reclamation, Secretary Ickes' appointee, advised the General Counsel of the Federal Land Bank, which was making loans on farms in the District, that the acreage limitation provisions of the reclamation law were not applicable to the District. *Ibid*.

On May 31, 1945, Interior Solicitor Fowler Harper issued an opinion to the effect that the acreage limitation provisions of the reclamation law should be written into the contract for repayment of the cost of new distribution works serving Coachella Valley County Water District, which had no present perfected rights. Solicitor Harper's opinion was critical of the Wilbur ruling but did not purport to overrule it. Solicitor Harper acknowledged the inapplicability of acreage limitations to Imperial Irrigation District, where

³⁶ Secretary Ickes executed four other major contracts under the Project Act: (i) with the City of San Diego, October 2, 1934, The Hoover Dam Documents, House Document No. 717, 80th Cong., 2d Sess., at A671; (ii) with the State of Arizona, February 9, 1944, id., at A559; (iii and iv) with the State of Nevada, March 30, 1942, id., at A571 and January 3, 1944, id., at A579. None of these contains an acreage limitation on private lands.

"vested" (present perfected) rights existed, but noted that no such rights appeared to exist in Coachella:

"Although the language of the letter of Secretary Wilbur seems broad enough to include the Coachella Valley District lands, the letter was clearly intended only to apply to the Imperial Irrigation lands. It apparently assumes that all privately owned land in the District was under irrigation and has a vested water right. Nothing in the files indicates whether such is the factual situation, and there is strong indication that the Coachella Valley lands are to a very large degree as yet not irrigated." 37

In 1946, the Bureau of Reclamation, under Secretary J. A. Krug, issued a report entitled "Landownership Survey on Federal Reclamation Projects." This report stated that there were 402 land ownerships larger than 160 acres per single ownership in the District, and that the excess land provisions of the reclamation law were not applicable to these lands. *Ibid*.

In 1948, Secretary Krug reaffirmed the nonapplicability of acreage limitations to the District. Following the consummation of the Coachella supplemental contract, which expressly required that water deliveries be limited to 160 acres per landowner, the Veterans of Foreign Wars requested that Secretary Krug reverse Secretary Wilbur's ruling so that the District

³⁷ As Judge Turrentine observed:

[&]quot;There was of course ample data then available to show that in Imperial Valley there were in excess of 400,000 acres receiving pre-project irrigation in reliance on rights to Colorado River water. The major weakness of the Harper decision as it relates to Imperial Valley is its failure to deal with this question of pre-project water rights." 322 F.Supp., at 25.

would be treated in the same fashion as Coachella. Secretary Krug declined. Without reaching the merits of the question, he explained the substantial inequity of reversing 15 years of consistent administrative interpretation, which had been relied upon by landowners in the District:

"[W]e have concluded that inasmuch as the Secretary of the Interior then charged with the administration of law construed the acreage limitation as not being applicable to lands of the Imperial Irrigation District under the facts as he then understood them, and it being clear that the then owners and subsequent purchasers of irrigable lands in the Imperial Irrigation District were entitled to rely upon advice from the Secretary and thus establish an economy in the district consistently with that advice, they should not now be abruptly advised that the economy of the project is to be changed under a contrary ruling of the present officer charged with the administration of the law." 71 I.D., at 515; 322 F. Supp., at 24-25.

Solicitor White concurred in Secretary Krug's decision to reaffirm the Wilbur ruling. Exhibit LX-34 in the District Court.

In 1952, the contract between the United States and the District was amended by a supplemental contract, signed by Secretary Oscar L. Chapman. Solicitor Edward Weinberg, who participated in the contract negotiations, testified that the Department had considered attempting to negotiate an acreage limitation clause in the supplemental contract, but decided not to do so. See the discussion of Secretary Krug's actions, 322 F.Supp., at 25.

The Wilbur ruling was again affirmed by the Department of the Interior in 1958, when the Special Master in Arizona v. California requested briefs on the question of whether the acreage limitation provisions applied to the District. The Solicitor General requested the view of the Solicitor of the Department of the Interior. Solicitor Elmer F. Bennett, acting under Secretary Fred A. Seaton, replied that acreage limitations did not apply to the District. He specifically noted the history and consistency of the Department's practice in this respect:

"The water contract between the United States and the Imperial Irrigation District was executed December 1, 1932, some 25 years ago. The negotiations leading to the contract were lengthy and extensively in the public view. Except at the time of court confirmation, I am not aware of any challenge as to the legality of the contract during this entire period. Water has been delivered to the lands of Imperial District pursuant to the contract since the early 1940's. I am not aware that any administrative action has been proposed or taken either by the preceding administration or by this one to recognize or enforce application of the 160-acre limitation to the lands of the Imperial Irrigation District.

"'The United States acting through the then Secretary of the Interior accepted the contract as having been confirmed and acting thereon proceeded to initiate construction of the All-American Canal and engage upon a variety of transactions in reliance upon the validity of the contract. There must surely arise a point of time, again I believe long since past, when the contract in keeping with the terms of Article 31 became binding upon the United States and the District. To treat otherwise at this date could have far-reaching effect (emphasis added)." 322 F.Supp., at 26.

Judge Turrentine summed up the administrative practice as follows:

"This history of the administrative practice has necessarily been selective, but a thorough review of Departmental policy has failed to disclose a departure from the interpretation initiated by Secretary Wilbur until 1964. This interpretation was followed during the incumbencies of six successor Secretaries and four Presidential administrations." 322 F.Supp., at 26.

He identified the Secretaries:

'Secretary Ickes under Presidents Roosevelt and Truman; Secretaries King and Chapman under President Truman; Secretaries McKay and Seaton under President Eisenhower. During his tenure under President Kennedy, Secretary Udall did not disturb the interpretation." Id., at n.30.

Not until 1964, when Solicitor Barry issued his opinion purporting to overrule Secretary Wilbur's ruling, did the Department of the Interior's policy depart from the ruling.

Subsequent to the Barry opinion, the Department of the Interior for several months attempted to negotiate a new contract with the District which would have incorporated the acreage limitation provisions of the reclamation law. When the District declined to negotiate a new contract, insisting on its rights under the existing contract, the United States brought this action for declaratory relief.

This Court has repeatedly applied the principle of statutory interpretation that an agency's long-standing construction of its statutory mandate is entitled to great weight. E.g., United States v. Rutherford, 442

U.S. 544 (1979); Board of Governors v. First Lincolnwood Corp., 439 U.S. 234 (1978): Bayside Enterprises. Inc. v. NLRB, 429 U.S. 298, 304 (1977); NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974); Zemel v. Rusk, 381 U.S. 1, 11-12 (1965); Udall v. Tallman, 380 U.S. 1, 16-18 (1965). Administrative interpretation is particularly persuasive (i) where, as here, the administrative practice involves a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new," Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933); (ii) where, as here, "[t]hese agencies cooperated in developing the act," 38 Adams v. United States, 319 U.S. 312, 314-15 (1943); and (iii) where, as here, "Congress has refused to alter the administrative construction." 39 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 384 (1969).

The Court of Appeals acknowledged that, "in practice, the Department of the Interior did not enforce the 160-acre limitation on lands in the Imperial Irrigation District." 559 F.2d, at 540. The court concluded, however, that this practice was not determinative because it was justified on the basis of (i) the Wilbur ruling, which the Court of Appeals determined to be legally incorrect, and (ii) on what the court characterized as "previous inaction"—the Department of the Interior had used the term "fairness"—which, in the

³⁸ For the role played by the Interior Department in the drafting of the Project Act, see supra at 39-41.

³⁹ For a discussion of congressional ratification of the Department of the Interior's interpretation of the Project Act to the effect that it does not authorize acreage limitations in the District, see infra at 60.

court's view, was not "an administrative determination to which the courts should defer." Ibid.

Of course, a court may always disregard an administrative practice which is clearly contrary to the statute pursuant to which the agency purported to act. Here, however, it would be ludicrous to assert that Secretary Wilbur's ruling was clearly wrong. It was in accord with longstanding regulations and practice (see infra at 66-67), it was confirmed by a court of competent jurisdiction (see infra at 69-72), it was made known repeatedly to Congress, which appropriated money to construct the All-American Canal with knowledge that it was to serve lands possessing vested rights, irrespective of their area, (see infra at 60-64), and it was adhered to by Secretary Wilbur's successors for 31 years. The most that might be said is that the Project Act is arguably susceptible to an interpretation other than that ascribed to it by Secretary Wilbur, and that the Court of Appeals would have adopted such an alternative interpretation, instead of that adopted by Judge Turrentine and the six Secretaries who adhered to Secretary Wilbur's interpretation, had the question come before it for decision. Even if this were supposed to be the case, however, it would not warrant judicial disregard of administrative practice many years after the fact. As this Court has said on numerous occasions:

"When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' Unem-

ployment Comm'n v. Aragon, 329 U.S. 143, 153. See also, e.g., Gray v. Powell, 314 U.S. 402; Universal Battery Co. v. United States, 281 U.S. 580, 583 (emphasis added)." 380 U.S., at 16.

Thus, the Court of Appeals' disagreement with the Wilbur ruling, considered in light of the particular facts surrounding that ruling—namely, its subsequent judicial, congressional, and administrative ratification—does not justify retroactive judicial disregard of the administrative practice based on that ruling.

As to the Court of Appeals' contention that the administrative practice involved here should be disregarded because it was justified in part on "previous inaction": it is true that several of the later Departmental explanations for the non-application of acreage limitations to Imperial Valley were to the effect that a reversal of prior Departmental policy and practice would be unfair to those who had relied on that policy and practice. But such a concern with fairness and constancy is fundamental to the principle of administrative construction. As this Court in *United States* v. Northern Pacific Railway Co., 242 U.S. 190 (1916), said:

"Statutes should be construed, as far as possible, so that those subject to their control may, by reference to their terms, ascertain the measure of their duty and obligation, rather than that such measure should be dependent upon the discretion of executive officers, to the end that ours may continue to be a government of written laws rather than one of official grace." Id., at 195.

And with specific regard to expectations created by long-standing administrative practice, this Court said

in United States v. Midwest Oil Co., 236 U.S. 459 (1915):

"It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself,—even when the validity of the practice is the subject of investigation." Id., at 472-473.

Individuals have for years bought and sold land, built farms, and paid ad valorem and estate taxes in the District in reliance on the United States' continuing assurance that the Project Act did not authorize acreage limitations there.

Moreover, the administrative practice involved here was not a failure to act or a casual disregard of a statutory mandate. Rather, it was a deliberate and positive interpretation of the statute. Clearly, public reliance on such a practice is a valid reason for continuing the practice, and in no way should detract from the importance of the practice for purposes of statutory construction.

D. Congress has ratified administrative construction to the effect that the Project Act does not authorize acreage limitations in the District

From 1934, when Secretary Ickes first appropriated P.W.A. funds for the construction of the All-American

Canal, until the present, Congress has been aware of the fact that deliveries of water to the District from the All-American Canal were not being limited to 160 acres in single ownership. 40 Yet Congress has never amended the Project Act to require such limitation.

Indeed, Congress has three times "revisited the Act and left the practice untouched." Saxbe v. Bustos, 419 U.S. 65, 74 (1974). In 1940, after extensive hearings, Congress enacted the Boulder Canyon Project Adjust-

⁴⁰ See, e.g., Hearings on H.R. 13710 Before a Senate Subcommittee on Appropriations, 72d Cong., 2d Sess., at 97 (1933); Hearings on H.R. 3961 Before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess., pt. IV at 599, 631, 764-65 (1944); Hearings on S. 295 Before a Subcommittee of the Senate Committee on Irrigation and Reclamation, 78th Cong., 2d Sess., at 184, 450, 482 (1944); Hearings Before a Subcommittee of the Senate Military Affairs Committee, 78th Cong., 2d Sess., at 33 (1944); Hearings on H.R. 6335 Before a Subcommittee of the Senate Appropriations Committee, 79th Cong., 2d Sess., at 1108-19 (1946); Hearings on Irrigation and Reclamation Before a Subcommittee of the House Committee on Public Lands, 80th Cong., 1st Sess., at 11 (1947); Hearings on S. 912 Before a Subcommittee of the Senate Committee on Public Lands, 80th Cong., 1st Sess., at 159-60, 162, 166, 179, 431-32 (1947); Hearings on S. 1385 Before the Senate Committee on Interior and Insular Affairs, 81st Cong., 1st Sess., at 12, 15, 50-51 (1949); Hearings on S, 1425, S, 2541, and S. 3448 Before the Subcommittee on Irrigation and Reclamation of the Schate Committee on Interior and Insular Affairs, 85th Cong., 2d Sess., at 11, 19, 85, App. C at 7 (1958); Acreage Limitation Policy, Committee Print of Senate Committee on Interior and Insular Affairs, 88th Cong., 2d Sess., at 25, 350-51 (1964); Water Policies for the Future, Final Report to the President and to the Congress of the United States by the National Water Commission (1973); Acreage Limitations in Bureau of Reclamation Projects: Hearings Before Subcommittee on Public Lands and Development of the Senate Committee on Energy and Natural Resources, 95th Cong., 2d Sess., pt. 3 (1978); Reclamation Reform Act of 1979: Hearings Before the Subcommittee on Energy Research and Development of the Senate Committee on Energy and Natural Resources, 96th Cong., 1st Sess. (1979).

ment Act, 54 Stat. 779, 43 U.S.C. §§ 618 et seq., which superseded various financial provisions of the Project Act, and specifically reenacted certain other provisions of that Act relating to water rights. In 1946, Congress passed an act to amend § 9 of the Project Act, 60 Stat. 36, 43 U.S.C. § 617h, which limits entries on public lands to 160 acres. And in 1968, Congress further supplemented the Project Act with the Colorado River Basin Project Act, 82 Stat. 886, 43 U.S.C. §§ 1501, et seq., enacted after this Court's opinion and first decree in Arizona v. California. That Act provided inter alia that the Secretary, in making allocations under the Project Act in time of shortage must first satisfy present perfected rights in order of priority. In none of these three instances did Congress take action to require a change in the administrative practice-known to Congress-of delivering water to the District without regard to acreage, in satisfaction of present perfected rights.

This Court has held that, in appropriate circumstances, congressional acquiescence in an administrative practice which is not in complete harmony with the statutory language can have the effect of qualifying that language. For example, in Saxbe v. Bustos, supra, the Court said:

"Such a history of administrative construction and congressional acquiescence may add a gloss or qualification to what is on its face unqualified statutory language." 419 U.S., at 74.

It is an a fortiori proposition that where, as here, administrative construction and congressional acquiescence therein are in complete conformity with the "unqualified statutory language" (i.e., the § 6 requirement that present perfected rights be satisfied and the § 14 provision that the reclamation law applies only to the

extent that it is not in conflict with specific provisions of the Project Act), such congressional acquiescence should be accorded great weight in the construction of the relevant statute.

Nor has Congress' role been limited to mere acquiescence in the face of a known administrative practice. Congress has also taken affirmative steps to ratify that practice. Every year from 1936 through 1950, Congress appropriated funds for the construction and/or operation of the All-American Canal with knowledge that deliveries to the District were not being limited to 160 acres in single ownership.⁴¹

In Ivanhoe Irrigation District v. McCracken, supra, this Court held inter alia that annual appropriation of funds by Congress for the Central Valley Project constituted ratification of an administrative construction to the effect that the excess lands provisions of the reclamation law applied to the Central Valley Project. 357 U.S., at 293. If the same reasoning is applied to the circumstances of the present case, which involves a different statute (the Project Act) and a different administrative construction, one must conclude that Congress, in making large, annual appropriations for the All-American Canal, ratified administrative construction to the effect that the Project Act does not

^{41 49} Stat. 1757, 1785 (1936); 50 Stat. 564, 596 (1937); 52 Stat. 291, 223 (1938); 53 Stat. 685, 718 (1939); 54 Stat. 406, 437 (1940); 55 Stat. 303, 336 (1941); 56 Stat. 506, 535-36 (1942); 57 Stat. 451, 476 (1943); 58 Stat. 463, 489-90 (1944); 59 Stat. 318, 342 (1945); 59 Stat. 632, 648 (1945); 60 Stat. 348, 368 (1946); 61 Stat. 460, 476 (1947); 62 Stat. 1112, 1131 (1948); 63 Stat. 765, 782 (1949); 64 Stat. 275, 285 (1950); 64 Stat. 595, 686 (1950). Appropriations for operation were no longer required after transfer of operation by Secretary Chapman to the District in 1952 (supra, p. 54).

authorize application of the excess lands provisions of the reclamation law to the District.

Judge Turrentine aptly summed up the congressional ratification of Secretary Wilbur's ruling with the following findings:

"Congress for more than 30 years was fully aware of the 1933 ruling and interpretation of Secretary Wilbur and of the administrative practice predicated thereon. The Imperial Valley situation in light of such interpretation and practice was called to its attention in appropriation hearings for the construction and operation of the All-American Canal, at the hearings on the Central Valley and San Luis projects and at the hearings on the Small Projects Act of 1958.

"In addition to the foregoing, copies of the Bureau of Reclamation's excess land surveys of 1946 and 1964 were filed with Congress.

"At no time from 1933 to the present has Congress taken any action in derogation of the propriety of the Wilbur interpretation or of the long standing administrative practice which followed it." 322 F.Supp., at 27.

This congressional ratification of administrative construction is entirely consistent with the plain language of §§ 6 and 14 of the Project Act, with the legislative history of the Act, and with the Hewes decision, and is therefore entitled to great weight.

II.

The Decisions Not To Apply An Acreage Limitation To The Privately Owned Lands In Imperial Irrigation District Have Become Final and Irreversible

As with any other major project of comparable size, Congress left many details—some quite importantto secretarial discretion. These included, for example, the design, the capacity, and even the location of Hoover Dam, and the size of the All-American Canal. Congress' overriding intention, however, was that decisions once made were not subject to being remade by each new Secretary of the Interior. Hoover Dam is set in cement and steel, and located in Black Canyon, not Boulder Canyon; but it takes no argument to prove that the Secretary's discretion having been exercised, and the cement poured, his decision cannot be remade even if Boulder Canyon were now proved to be a better location.

The legal decisions were meant to be equally irrevocable—as irrevocable as any aspect of the law, state or federal, relating to the title to real property. Water rights, indeed, are real property. In Imperial Valley, they are the only rights, other than mineral rights and geothermal rights, that give land its value.

Who was to receive water stored behind Hoover Dam was a matter of overriding concern throughout the Colorado River Basin from the first moment the possibility of such a dam was conceived—a dam "in or for the benefit of the Lower Basin." Article VIII of the Colorado River Compact, written in 1922, expressed the core principle that, "Present perfected rights"—water rights perfected by appropriation and use of water—were to be unaffected by the Compact, except in one carefully specified particular: they should attach to and be satisfied by the waters stored by any lower basin reservoir with a capacity of five million acre-feet or more.

Disposition of the water stored behind Hoover Dam was provided for in the legislation authorizing its construction. That legislation incorporated and perpetuated, with repeated and meticulous emphasis, the protections for existing rights specified in the Colorado River Compact. The dam must be used to satisfy "present perfected rights."

Every device known to the law was prescribed in an effort to put at rest and to determine conclusively any questions about rights to the use of that water. Specifically, the devices directed to be employed were (i) general regulations to control the writing of contracts for the use of water stored behind Hoover Dam, (ii) contracts "for permanent service" which once written could not be rewritten, except of course with the consent of the parties, and (iii) the device of the validation proceeding, 43 U.S.C. § 511, to set the arrangements in the cement of res judicata.

A. Regulations

Secretary Wilbur's determination that acreage limitations do not apply to privately owned lands in the District was made in the course of discharging the responsibility placed on him by the Project Act in making the contract with the District. It was a ruling adhered to by all of his successors—six Secretaries in four Presidential administrations, over a period of more than three decades—until this suit was initiated.

If Secretary Wilbur had decided otherwise, he first would have had to vacate the Department's 1910 regu-

lation (App. 216a) which codified Departmental practice prevailing since at least 1905:

"The provision of section 5 *2 of the reclamation act limiting the area for which the use of water may be sold does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through the works constructed by the Government under appropriate regulations and charges."

It is axiomatic that an agency is bound by its own regulations and that the public is entitled to rely on those regulations. Professor Davis puts it this way:

"[A] legislative rule is clearly binding on the agency that issues it. The best single authority may now be United States v. Nixon, 418 U.S. 683, 694-696 (1974)." 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 98 (2d ed. 1979).

The 1910 regulation is clearly a legislative rule, and has remained in force, unchanged, for 70 years. It is now codified at 43 C.F.R. 230.70.

Secretary Wilbur's ruling, and the implementation of that ruling by Secretaries Ickes, Krug, Chapman, McKay, Seaton, and Udall (during his tenure under President Kennedy) were made against the background of two decisions of this Court which are foundations to the interpretation of the law of the Colorado River. The first was Wyoming v. Colorado, 259 U.S. 419 (1922), decided while the Colorado River Compact

⁴² Our footnote: this Court, in *Ivanhoe Irrigation District* v. *Mc-Cracken*, supra, called § 46 of the Omnibus Adjustment Act of 1926 a "reenactment" of § 5 of the Reclamation Act of 1902. 357 U.S., at 290.

was under negotiation, and declaring that prior appropriation is the controlling principle of interstate adjudications of interstate water rights among western states, except where expressly departed from. That decision produced the Colorado River Compact. The second was Arizona v. California, 283 U.S. 423, 459 (1931), in which Justice Brandeis articulated the essential feature of a water right in western states, acquired by appropriation and use: "a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations." This decision upheld the authority of the Secretary, challenged by Arizona, to construct Hoover Dam. The Project Act was valid because it did not interfere with those vested rights.

B. Contract

Contract has always been a central device in reclamation law to make clear, definite, and durable the rights, including institutional arrangements for their satisfaction, in reclamation projects. In the beginning (i.e., after 1902 when the Reclamation Act was passed) contracts arose out of water right applications by individual farmers using water. Such an arrangement was cumbersome, and had been largely discarded before the Project Act in favor of contracts with an irrigation district or public entity. 43 U.S.C. § 511. The irrigation district was a practical necessity in the administration of projects.

There is no question as to the intention of the parties to the contract between the Secretary of the Interior and the District. It was just as clear here that they did not intend to include an acreage limitation—

Secretary Wilbur said so in writing—as it was clear in *Ivanhoe* that the parties intended the opposite. The electors of the District approved the contract on that understanding, as the court in *Hewes* found. App. 144a, Finding 35.

Not only was the contract a device to secure certainty; it was a device to secure consensus and understanding among the water users by making clear what they were receiving and what responsibilities they were undertaking in exchange for those benefits.

C. Validation by judicial proceeding

The contract between the United States and the District required judicial validation. 43 U.S.C. § 511. Article 31 of the contract repeated the language of that statute.

The purpose of the requirement of validation was clear. That purpose was to give legal certainty to all the matters which were the subject of the contract—to set in legal cement the terms of the mutual undertakings of the District and the United States, sealed by the doctrine of res judicata.

The Court of Appeals says that everything determined by such a proceeding, other than "validity," is "pure dicta." 559 F.2d, at 526. The court was led into error by reading, in isolation, two sentences from the California Supreme Court's two opinions in *Ivanhoe Irrigation District* v. All Parties:

(i) "The judgment [in a confirmation proceeding] is limited to a determination of the validity of the contract." 47 Cal. 2d at 607, 306 P.2d at 829 (1957).

(ii) "This proceeding is in rem in nature. In such an action the only issue involved is the validity of the contract." 52 Cal. 2d 692, 699, 3 Cal. Rptr. 317, 320, 350 P.2d 69, 72 (1960).

One of these utterances preceded, and one followed, the opinion of this Court in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958). Both sentences are quoted by the Court of Appeals. 559 F.2d, at 525.

It is clear that these sentences in isolation do not state the effect of a validation proceeding in California. A judgment determining solely the abstract question of validity without reference to what the contract provided would serve no useful purpose. What is worse, it would have all the destructive power of a loose cannon on the pitching deck of a man-of-war in heavy seas. Such a judgment would conclusively determine that the contract was binding, but without regard to how it might be construed or interpreted.

No one can read the two *Ivanhoe* opinions of the California Supreme Court and the intervening opinion of this Court without recognizing that the California court, in the first case, determined that a contract with an acreage limitation clause could not be valid. The second California Supreme Court opinion determined that the contract was valid incorporating the acreage limitation. The state court determined, in each instance, what it purported to determine. This Court would have had no jurisdiction on certiorari to hear the case and to reverse if the only determination had been abstract "validity" or the capacity of the District to enter into some kinds of contracts.

Validation proceedings have been an essential part of reclamation law ever since the California legislature enacted the Wright Act in 1887. That act established the pattern, copied in most of the states of the west, to achieve the finality of res judicata by a judicial proceeding.

As early as 1913, in Hanson v. Kittitas Reclamation District, 75 Wash. 297, 134 Pac. 1083 (1913), the preclusive effect of a validating judgment was sustained. Andrews v. Lillian Irrigation District, 66 Neb. 458, 92 N.W. 612 (1902), rehearing, 97 N.W. 336 (1903). The Washington court acknowledged the California Wright Act as the model for the Washington Act and similar irrigation district laws in fourteen of the sixteen States in which irrigation was practiced. The court also pointed out that the in rem proceeding, which results in a judgment against "the world," is not novel. Adjudications in bankruptcy, admiralty, and receiverships have the same in rem nature.

The usefulness of validation proceedings is dependent on the resulting judgments effectively deciding the litigated questions. It should be remembered that res judicata is not a technical and medieval doctrine. It is a doctrine which it would be necessary to invent if it did not exist. Most of the changes have been in the direction of extending its finality. Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940), decided by a unanimous court, illustrates the reach of finality. In Chicot County, a judgment based on an unconstitutional statute achieved finality. Bonds were discharged in a municipal bankruptcy, and their holders appealed. While appeal was pending, the bankruptcy law was held unconstitutional by this Court in another case. The Court held in Chicot

County that the discharge was res judicata despite unconstitutionality of the statute.

This Court, in Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336-337 (1958), made an observation that is particularly appropriate here. Speaking of the finality to be accorded under the Federal Power Act to a court of appeals decision on review of an order of the Federal Power Commission, it said:

"Such statutory finality need not be labeled res judicata, estoppel, collateral estoppel, waiver or the like either by Congress or the courts."

Justice Whittaker's language expresses very well the purpose of Congress in enacting 43 U.S.C. 511, requiring judicial validation of the contracts of irrigation districts with the United States.

Law that has been relied on as final, based on every legal device to achieve certainty for nearly 50 years, cannot be rewritten retroactively.

The essence of a rule of property is justifiable reliance. The All-American Canal was constructed on the basis of the explicit and repeated understanding, made final by every doctrine of repose known to the law, that it would serve the same lands as the District's works which it replaced. The reliance was justifiable, if reliance can be placed on the pledged word of the United States of America.

The decision of the Court of Appeals would have been wrong in 1933, had it been substituted for that of the court validating the agreement of the United States and the District. It is egregiously wrong in 1980 after at least two generations, in reliance on the 1933 adjudication, have paid taxes and land prices based on the market value of the land irrigated.

D. The attempted destruction of established values.

Before leaving the subject of established values and turning to the subject (in Part III) of the standing of those who have intervened here in order to seize those values, it may be permissible to put the contrast between the two in sharp focus.

There was no increment of unjust enrichment to the landowners of 50 years ago in consequence of enactment of the Project Act. They were already irrigating all but three per cent of the land now irrigated by the All-American Canal. And if there were room for doubt, that doubt should have been dispelled when the District in 1934 was forced to seek the benefit of the municipal bankruptcy law because the land irrigated could not pay debt service on the existing bonded indebtedness, quite aside from the new debt to the government.

The present landowners are the purchasers of the land served by the All-American Canal. They have nearly all paid the full market value of the land they own, or if they acquired it by devise or inheritance, they paid taxes based on market value. The annual ad valorem assessments are also based on market value. The Yellen group, if successful in establishing the law according to their allegations, will buy that land at less than market value, ripping off the present owners who have paid full market value, and—the day after their hoped-for purchase—they will be able to sell at full market value.

⁴³ In re Imperial Irrigation District, 10 F. Supp. 832 (1934). Reversed in 87 F.2d 355 (1936), after the Municipal Bankruptcy Act had been declared unconstitutional in Ashton v. Cameron County Water District, 298 U.S. 513 (1936). After a new municipal bankruptcy act was sustained in Bekins v. U.S., 304 U.S. 27 (1938), the District's reorganization plan was approved and became effective.

It would be ironic if the Yellen group, who are seeking a windfall, should be deemed to have acquired standing for that effort by invoking what they describe as the anti-speculation purposes of the reclamation law. As noted earlier (p. 9) the Interior Department, in proposing new regulations in 1977 (10 years after commencing this suit) stated one of the justifications of these regulations to be that:

"The regulations discourage speculation by allowing the Department to exercise continuing supervision over the sale price of land after it is sold into non-excess status. This reverses the current practice of allowing an excess land purchaser to realize the windfall profits represented by low-priced federal water in an immediate resale (emphasis added)." App. 219a.

Further irony is added by an opinion of the Solicitor of the present Secretary, issued May 18, 1979, (M-36913, 86 L.D. 300), interpreting the proposed regulations, in which he said:

"To summarize what follows, I hold that section 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e, requires the Secretary to control and approve the purchase price of both initial sales of excess land, and resales of this formerly excess land until one-half of the construction charges allocated to such land has been paid (emphasis added)." Interior Sol. Op. M-36913, Reclamation Law—Control of the Sale Price of Formerly Excess Lands, May 18, 1979, p. 1.

If the Solicitor's language means what it says, the consequence of the payment of one-half of the construction charges by the present landowners or their predecessors is this: (i) The present landowners, who, with their predecessors, made these payments, must

nevertheless sell their excess lands at below-market prices approved by the Secretary (if the Court of Appeals decision is given effect see 595 F.2d, at 527). But (ii) Dr. Yellen (or some other buyer at the Secretary's below-market price) can resell at once at full market price because, and only because, his unfortunate and unwilling vendor had paid off one-half of the construction charges. In this instance, the "present practice of allowing an excess land purchaser to realize the windfall profits" is not reversed, but reconfirmed. This result, outrageously unfair, is what the present Secretary's Solicitor reads into § 46 of the 1926 act as interpreted in his proposed regulations.

Beyond this, the Solicitor says that the proposed regulations, insofar as they give the Secretary power to police subsequent resales of lands sold at the Secretary's price, are not to be made retroactive, because this would be unfair to those who have bought and sold excess lands in reliance on past Departmental practice. This new concern about retroactivity might well have prevented the filing of this suit in the first place.

III.

The Court of Appeals Erred In Applying Constitutional "Case And Controversy" Requirements By Allowing Respondents, Ben Yellen, Et Al., To Participate As Parties Based On Conjectural Harm And Speculative Relief

We trust that the Court will reverse the decision of the Court of Appeals on the merits. But as this Court may regard the issue of respondents' standing to appeal from the judgment against the United States as a jurisdictional question, we are constrained to point out to the Court the extreme frailty of their claim of standing. We contend that (i) the respondents, Dr. Yellen, et al., never had standing, and (ii) assuming, arguendo they once had standing, it has been terminated under the terms of § 46 of the Omnibus Adjustment Act, because any authority in the Secretary of the Interior to fix prices on sales of excess lands in Imperial Valley expired on March 1, 1978, while this case was on appeal.

A. The constitutional tests of standing

In the recent case of Gladstone Realtors v. Village of Bellwood, 47 U.S.L.W. 4377 (April 17, 1979), this Court articulated the constitutional limits on standing in federal courts as follows:

"In recent decisions we have considered in some detail the doctrine of standing in the federal courts. 'In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. . . . In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society.' Warth v. Seldin, 422 U.S. 490, 498 (1975).

"The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant. In order to satisfy Art .III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. Duke Power Co. v. Carolina Environmental Study Group, — U.S. —, —, 98 S. Ct. 2620, 2630 (1978); Arlington Heights v. Metropolitan Devel-

opment Housing Corp., 429 U.S. 252, 260-261 (1977); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976); Warth v. Seldin, supra, at 499; Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973). Otherwise the exercise of federal jurisdiction 'would be gratuitous and thus inconsistent with the Art. III limitation.' Simon v. Eastern Kentucky Welfare Rights Org., supra, at 38."

Dr. Yellen, et al., fail to pass these tests, as we show below.

B. How the respondents got into court

Dr. Yellen and his fellow respondents were allowed by the Court of Appeals (another panel) to intervene in the acreage case by mistake. As the Court of Appeals said here:

"The order allowing intervention [559 F.2d, at 543] also appears to be based on a misunderstanding as to the identity of the various intervenors. The district court allowed various interested Imperial Valley landowners to intervene as defendants early in the proceedings. This Court's earlier order allowing intervention refers to the 'interested Imperial Valley landowners' as the group seeking to perfect and prosecute the appeal. In fact, this group had obtained a favorable decision from the district court and opposed the prosecution of an appeal by parties other than the government. It was the Yellen group, a group of nonlandowners, who had filed the protective notice of appeal and who sought to prosecute the appeal, and whose intervention request had been denied by the district court." 559 F.2d, at 520, n.15.

That order, 559 F.2d, at 543, mistaken as to the identity of Dr. Yellen and his colleagues (believing them to be intervening landowners, whereas their

claim of standing is based on their status as non-landowners), was mistaken also in its assumption that Dr. Yellen's standing in the residency case would be approved on appeal, and for this reason only (in order to enable both cases to be heard on the merits in one proceeding), their intervention on appeal in the acreage case was justified. As it turned out, however, the Court of Appeals reversed the District Court's holding that Dr. Yellen had standing in the residency case. The Court of Appeals concedes:

"Since the district court decision in the residency case must be vacated because of lack of standing on the part of the plaintiffs therein, the basis for the order allowing intervention in the acreage case has disappeared." 559 F.2d., at 520.

And:

"It would be ironic to allow the Yellen intervenors to use an erroneous district court ruling on standing in another case to bootstrap themselves into a position of litigating the important question of the enforcement of the federal reclamation laws in this case." *Id.*, at 521.

But the court proceeded to "once again examine the request for intervention," and held, de novo, that the Yellen intervenors did have standing to intervene after the judgment against the United States in the acreage case, in order to prosecute an appeal, notwithstanding the court's conclusion denying them standing in the residency case, even though they were in that case as plaintiffs, not as intervenors.

C. The lack of particularized injury

When the constitutional requirements for standing are properly applied, it becomes apparent that there is no more basis for judicial action on their behalf in the acreage case than there was in the residency case.

These respondents did not intervene in the District Court proceedings, which lasted nearly four years. They intervened after a judgment against the United States, from which Solicitor General Griswold decided not to appeal (see supra at 5, n.3). Theirs is not a class action, but one by Dr. Yellen and others alleging that, as individuals, they have each been caused a particular injury by the failure of the Secretary to enforce the excess land provisions of the reclamation law; they say that if he did enforce those laws each of them would be able to buy land at less than present market prices. They do not, and could not, allege (i) that the Secretary could force a landowner to sell, or (ii) that, if a landowner did sell, he would select any of these respondents as a buyer, or (iii) that any respondent has a preference in any respect against any other citizen of the United States, wherever he resides. Their claim of standing is analogous to that which might be asserted by members of the general public, seeking to intervene after a judgment against the United States in a civil antitrust suit, who might allege that, if the government had won, the market price of the commodities manufactured by the defendant would be lower.

If these respondents had wanted to inject the particularized issues related to their own individual pocketbooks, as distinct from a class action of the generalized sort that the United States brought, they should have done so by intervening at the trial, not after a judgment on the issues framed by the pleadings of the United States and the District. There was never an opportunity, at the trial, to challenge or rebut their

assertions of fact in post-judgment affidavits, which the Court of Appeals accepted as true.

The Court of Appeals almost conceded the point, saying:

"[A] party possessing the standing to intervene does not automatically have the ability to appeal a decision which all other parties have decided not to appeal. In order to be able to appeal, the intervenor must have an 'appealable interest.' [Citation omitted.] Resolution of this question turns on traditional standing analysis. [Citation omitted.] Mere interest in the establishment of a legal precedent is not sufficient. [Citation omitted.]" 559 F.2d, at 521.

But the court went on to decide, in result if not in words, that Dr. Yellen, et al. would have had standing to intervene in the District Court to participate in the trial (which they failed to do), and therefore these respondents had standing to intervene to appeal from the judgment against the United States, thus substituting their own value judgment for that of the Solicitor General, who had decided that the decision of District Judge Turrentine was right and should not be appealed. All parties to the proceedings in Judge Turrentine's court were satisfied with the outcome. Only the newcomer, surfacing after judgment, was not.

The Court of Appeals applied the Article III constitutional case and controversy requirements correctly to Yellen v. Andrus, the residency case, saying that respondents lacked standing because "the relief sought by the plaintiffs in this case would not come through the government action they seek" 559 F.2d, at 518, and that "any relief that could appropriately be ordered in this case would not redress plaintiffs'

alleged injuries." Id., at 519. Moreover, plaintiffs in the residency case had suffered no particularized harm:

"The injury plaintiffs allege—the inability to purchase farming land at prices they can afford—is neither particularized nor does it flow 'concretely and demonstrably' from the government's activities, or lack of activity, challenged in the complaint." *Id.*, at 519.

The Court of Appeals properly cites Turner v. Kings River Conservation District, 360 F.2d 184, 198 (9th Cir. 1966), in the residency ease for the proposition that plaintiffs "cannot claim injury from any failure of the government to discharge its duty to the public." 559 F.2d, at 518, n. 10. The same reasoning should control in the acreage case between the same parties. Respondents present only a question "of broad social import where no individual rights would be vindicated" Gladstone Realtors v. Village of Bellwood, 47 U.S.L.W. 4377, 4379 (1979).

If there is a distinction between the residency and acreage cases, it is a distinction without a difference.

Here, as in the residency case:

"[T]here is nothing in the record to indicate what price any plaintiff could afford to pay for any particular farm or that enforcement of the residency requirement of 43 U.S.C. § 431 will lead to a decline in farm land prices sufficient to bring those prices into a range where plaintiffs could afford to purchase a particular farm." Id., at 518.

In the residency case, these same respondents alleged an injury which is described by the Court of Appeals as follows:

"The essence of their case is that their ownership desires have been blocked because the government, by failing to enforce the residency provision of 43 U.S.C. § 431, permits irrigation water to be received by nonresident owners of farm land and that enforcement of the law will result in making farm land available for purchase at prices plaintiffs could afford." *Id.*, at 518.

This was found not to be enough. If this speculative parlay would not work in the residency case, it should have been held just as unworkable in the acreage case now at issue.⁴⁴

D. Redress

On rehearing in the acreage case, the court made a concession and stated an assumption:

"While it is true that landowners cannot be forced to sell their lands, it is only reasonable to assume that some land will become available for sale rather than being put into other than agricultural uses." 595 F.2d, at 527.

This assumption, in a nutshell, is the whole basis for Dr. Yellen's "standing." And, at that, the formula lacks, of necessity, an essential ingredient: there is not a shadow of a claim that if an excess landowner should decide to sell at the Secretary's below market price, rather than put his land into "other than agricultural uses," he could be compelled to sell to Dr. Yellen or another of the respondents, instead of electing to sell to some stranger to this suit. The absence of that element of standing, *i.e.*, that the requested remedy would redress the claimed injury to a particular individual,

⁴⁴ In Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 72 (1978), this Court stated that there must be "'a fairly traceable' causal connection between the claimed injury and the challenged conduct."

is fatal here, because this is not a class action, but a suit in strictly an individual capacity. Consequently, both injury and redressability must be shown as to these particular individuals, and this they have not done and cannot do.

E. Even if it is assumed arguendo that Dr. Yellen, et al., once had standing, that standing would necessarily have ceased when one half the construction costs of the All-American Canal were repaid.

The standing of respondents was predicated wholly on the allegation that these particular people would benefit if the Secretary were enabled to fix prices at less than market value on the forced sale of excess lands. ⁴⁵ But the Secretary's authority to fix prices, if he ever had it with respect to lands in the District, expired on March 1, 1978. Section 46 fixes a termination date on the Secretary's price-fixing authority in these terms:

"[U]ntil one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior. . . . (emphasis added)."

⁴⁵ This is a suit to enforce § 46 of the 1926 Act, not a suit to enforce § 5 of the Reclamation Act which also imposes a land limitation. The Court of Appeals was careful to make this distinction. 559 F.2d, at 537. The distinction was necessary because the court held that these same respondents lacked standing to sue to enforce the residency requirements of § 5. See 559 F.2d, at 517. It would have strained the imagination to discover that respondents had standing nevertheless to enforce the acreage limitation in that same section. But see *Ivanhoe Irrigation District* v. *McCracken*, which referred to the 1926 Act as a "reenactment" of § 5 of the 1902 Act. 357 U.S. 275, 290 (1958).

On March 1, 1978, the District completed repayment of more than one-half of the construction charges against all lands in the District. The court, on rehearing, acknowledged this, 595 F.2d, at 527, but held, on the authority of its decision in United States v. Tulare Lake Canal Co., 535 F.2d 1093 (1977), that the Secretary's authority to fix the sale price "on initial break up of excess lands" applies "regardless of the fact that construction charges for the irrigation project have been repaid. This decision [Tulare] expressly applies to all federal reclamation projects subject to Section 46." 595 F.2d, at 527. The holding here flies so directly in the face of the statute as to require no argument. To the extent that Tulare supports it, we respectfully suggest that this Court disavow that decision as a precedent.

Moreover, the Department is on record at least twice with official interpretations of § 46 as terminating the Secretary's power to fix prices when half of the construction charge is paid.

Regulations published August 22, 1977 (not to become effective until July 1981), provide that price approval, with reference to "involuntary acquisition of excess land" (by foreclosure, inheritance, etc.) will be required "until one-half of the total construction costs allocated to irrigation have been paid in regular scheduled installments" § 426.5(b), App. 232a. So also to lands which become excess in consequence of the death of a spouse. § 426.5(c), App. 232a.

And as recently as May 18, 1979, the Solicitor of the Interior Department promulgated an opinion in support of those regulations (see p. 74, supra).

The Secretary's authority to set prices for land (if he ever had it here) having terminated when the District repaid 50 percent of the costs, the controversy became moot at that point as to Dr. Yellen, et al., since the remedy which they sought was no longer available. "[W]hen, pending an appeal from the judgment of a lower court . . . an event occurs which renders it impossible for this court . . . to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." American Book Company v. Kansas, 193 U.S. 49, 52 (1895), quoting Mills v. Green, 159 U.S. 651, 653 (1895). Cf. DeFunis v. Odegaard, 416 U.S. 312 (1974); North Carolina v. Rice, 404 U.S. 244, 246 (1971).

If this Court determines that respondents lack standing, and decides the case on that issue without reaching the merits, we respectfully suggest that the appropriate procedure would be to vacate the order of the Court of Appeals permitting intervention (559 F.2d, at 543 (1973)) and the decisions of the Court of Appeals on the merits (559 F.2d, at 509 (1977) and 595 F.2d, at 525 (1979)), since respondents lacked standing to appeal the judgment of the District Court against the United States, thus leaving that judgment intact as res judicata. One thing that all agree upon is that the United States did have standing in the District Court.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the appeal of Yellen, et al., from the judgment of the District Court against the United States should be dismissed.

In the first alternative, if Yellen, et al., are held not to have had standing to intervene to appeal from the District Court's judgment against the United States, the judgment of the Circuit Court should be vacated and the order permitting intervention to appeal should be vacated.

In the second alternative, if the case has become moot while on appeal, in consequence of the payment of over one-half of the construction charges, terminating the Secretary's power to fix land prices, the judgment of the Court of Appeals should be vacated as having become moot while the case was under submission there, and the appeal should be dismissed.

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January 17, 1980



Supreme Court, U.S. F. I. L. D.

MAR 19 1980

IN THE

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-435

IMPERIAL IRRIGATION DISTRICT, ET AL., Petitioners,

v.

BEN YELLEN, ET AL., Respondents.

REPLY BRIEF OF PETITIONER IMPERIAL IRRIGATION DISTRICT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-435

IMPERIAL IRRIGATION DISTRICT, ET AL., Petitioners,

v.

BEN YELLEN, ET AL., Respondents.

REPLY BRIEF OF PETITIONER IMPERIAL IRRIGATION DISTRICT

 Jurisdiction: The Amorphous Status of the Solicitor General in This Case.

The Solicitor General has filed a brief in support of Respondents. He does not say whether he is appearing as amicus curiae, or believes that the United States is a party in the Supreme Court, notwithstanding its considered decision not to appeal from the ad-

¹References to the Solicitor General's brief appear here as "S.G. Br. —," to the brief of Dr. Yellen, et al., as "Resp. Br. —," to the District's initial brief as "Dist. Br. —," to the Consolidated Appendix as "A. —," and to the Appendix to Imperial Irrigation District's Petition for Certiorari, as "Pet. App. —." The appendix to the District's petition contained 248 pages, and the pagination of the Appendix to this reply brief therefore begins with page 249a.

verse judgment of the District Court.² If the United States is a party, it is only so because somehow it can piggy-back on the appeal of Dr. Yellen, et al., who were permitted by the Court of Appeals to intervene, in order to appeal from the judgment against the United States. The Yellen Group were not parties prior to judgment in the District Court, where the United States was plaintiff, the District was defendant, and the landowners and the State of California were the only intervenors.

Even if the appeal of an intervenor after judgment is found to resuscitate the expired case of the United States, which otherwise ended in the District Court, the Solicitor General faces two other hurdles before he can be heard here as counsel for a party. If the Yellen group lacked standing to appeal (see Dist. Br. 75-83), or lost that standing while the case was pending in the Circuit Court (id., at 83-85), the piggy-back ride fails, and the United States is not here as a party; it remains bound by the res judicata effect of the District Court judgment. So also if Respondents are found to be bound by the 1933 in rem Hewes judgment. Dist. Br. 69-73.

Apparently recognizing this, the Solicitor General goes to extreme lengths to support the standing of Respondents, and to aid their attempted escape from the res judicata effect of the judgment in the *Hewes* case.

² See Solicitor General Griswold's memorandum, infra at 249a, explaining in detail his decision not to appeal. 28 C.F.R. § 0.20(b) would appear to vest final authority in the Solicitor General to make such a decision, subject to the Attorney General's general supervision. This case presents the unique spectacle of a private party, who is suing in his own financial interest, not on behalf of a class, seeking to overrule the decision of the Solicitor General not to appeal a judgment against the United States, a decision which Solicitor General Griswold concluded was required by principles of good government, and by the responsibilities of his office.

The Solicitor General apparently believes that Dr. Yellen and his 122 colleagues have standing because Congress, in enacting the Project Act, intended them to have this windfall. (It must be remembered that this is not a class action.) But the very size of the honey pot-several hundred thousand dollars of increase of net worth to each lucky buyer-suggests that Dr. Yellen, et al., might have literally millions of competitors. This number might shrink if the Secretary could, and were of a mind to, limit the eligible buyers to residents of Imperial Valley. Its population is about 75,000. The present Secretary is on record as favoring a lottery. In such case, the chances of these particular 123 landowners for success in such a sweepstake is a rather shaky underpinning for standing to litigate the water titles of the District's landowners and the District's responsibilities as trustee of those water rights, and an even wobblier foundation for the derivative standing of the Solicitor General to reverse a District Court judgment from which the United States decided not to appeal.

II. Solicitor General Griswold's Decision Not to Appeal from the District Court's Judgment

In Appendix A to this brief we reprint the full text of Solicitor General Griswold's detailed "Memorandum for the Files," dated April 8, 1971, giving his reasons for not appealing from Judge Turrentine's decision. Solicitor General Griswold concluded, after a thorough discussion:

³ Appendix B is Secretary Morton's letter to the Attorney General, and Appendix C is Solicitor Melich's memorandum, both making the same recommendation as Solicitor General Griswold. This material became available to us for the first time on February 20, 1980, by publication in the Congressional Record at S1682.

"To me, the essence of this case is essentially a question of good administration of the government. Is it sound to have a government system in which official determinations are made, on questions which are at least debatable, are then outstanding for more than 30 years, 141 and are then decided another way by a succeeding governmental official? This does not strike me as good administration, or good government. Of course, life is filled with uncertainties, including commercial life and the ownership of property. But one of the functions of government is to provide for stability and to make it possible for the people to rely on situations which have been determined, and where they make commitments on the basis of that determination."

III. The Ultimate Issue, as Disclosed in the Solicitor General's Brief, Is Whether Congress, in Enacting the Project Act, Intended That Lands in Excess of 160 Acres per Owner Should Be Stripped of the Value of Their Present Perfected Water Rights.

The ultimate issue on the merits, as disclosed by the Solicitor General's brief, is this:

Notwithstanding the opinion and decrees of this Court in Arizona v. California, which construed the Boulder Canyon Project Act as requiring that present perfected rights shall not be impaired and directing the Secretary to deliver water in satisfaction of such rights, the Solicitor General and Respondents would now re-construe the Project Act as mandating that lands in excess of 160 acres per owner, having present perfected rights, must be sold at desert land prices, or

Our footnote: Solicitor Griswold was referring to Secretary Wilbur's determination that acreage limitations were not applicable to lands in Imperial Valley having vested water rights.

else, being denied water by the Secretary of the Interior, revert to desert. The value of the water right is reduced to zero if the value of irrigated land is arbitrarily reduced to that of desert land. The obliteration of the value of the water right—which is all that gives worth to land in the desert—is about as complete an impairment of that right as could be envisioned.

The possibility that Dr. Yellen, et al., will be the lucky purchasers of cultivated land at desert land prices is the basis of their supposed standing to appeal the District Court judgment against the United States. The Solicitor General seems unconcerned by a 1979 opinion of the Interior Department's Solicitor to the effect that, under the law as it now stands, Dr. Yellen and his colleagues could at once resell, at full market value, the lands which the Project Act, construed as the Solicitor General construes it, requires their present owners to sell for a pittance. See Dist. Br. 9, 74.

Respondents and the Solicitor General are quite explicit in their description of this multi-million dollar raid on present perfected rights. The Solicitor General says: "Respondents reside in the Imperial Valley and desire to purchase the excess lands for farming, but they cannot afford the current market price of \$1200

⁵ The Solicitor General thinks the acreage of excess lands is approximately 105,000 acres. S.G. Br. 4 n. 2. The Court of Appeals called it 233,000 acres, Pet. App. 69a, and cited Respondents' use of the same number, id., at 73a n. 6. Respondents now say the excess lands amount to some 265,000 acres. Resp. Br. 167. The differences do not affect the principle involved, which is whether lands to which present perfected rights are appurtenant shall be required to be sold as though they were desert, which they ceased to be when water was brought to Imperial Valley at private expense, commencing in 1901.

to \$1400 per acre. If the excess-acreage limitation is applicable, however, excess lands will no longer receive project water unless, as provided in Section 46, the owners execute valid recordable contracts to sell such lands at prices that do not reflect the use of water from the Boulder Canyon Project. The value of these lands, appraised as dry lands, is a fraction of their value as irrigated or potentially irrigable lands, and has been estimated to be only \$25 to \$50 per acre (emphasis added)." S.G. Br. 22. And later: "Hence, in order for their excess lands to continue to receive project water, landowners would be required to agree to sell those lands at prices that reflect their 'value as dry land rather than as irrigated or potentially irrigated land' (emphasis added: citations omitted)." S.G. Br. 78. He continues, in support of Dr. Yellen's assertion of standing, "in any event, respondents' affidavits, fairly read, indicate that they would seek to purchase land at \$25 to \$50 per acre, which was their estimate of the appraised value of the land without reference to project water." S.G. Br. 85 n. 49. Respondents believe that "[i]f the decision of the court of appeals is affirmed, approximately 265,000 acres of excess lands will be sold . . . at below market prices." Resp. Br. 167. "The execution of recordable contracts will definitely result in the sale of over a quarter million acres of some of the finest farm land in the world at below market prices." Resp. Br. 170. They say that since the "ex-contract [i.e., desert land] market value of farm land in the Imperial Valley was approximately \$25 to \$50 per acre at the time respondents sought leave to intervene, while irrigated lands had a value of \$1,200 to \$1,400 per acre, it is unlikely that respondents would have any difficulty obtaining sufficient funds either through private or government lending sources." Resp. Br. 169. "The excess lands have very little value without the subsidized water." Resp. Br. 171. See Dr. Yellen's affidavit of March 14, 1971, at Pet. App. 245a.

Using Respondents' figures, the windfall to the speculator (even if the 1971 value of cultivated land had not escalated) would be \$216,000 per 160 acres or, if the buyer is married, \$432,000 per 320-acre farm. This is the value of the lost water right, the difference between the value of cultivated land and desert land.

If Respondents prevail, the aggregate loss to the present landowners (and windfall to the purchasers), according to Respondents' figures,* will exceed three hundred million dollars, or 12 times the cost of the All-American Canal.

Respondents say that they and the government are in agreement that they are the "beneficiaries intended by Congress." Resp. Br. 147. It matters not whether Respondents keep the expropriated lands or

^{6 (\$1,400—\$50)/}acre x 160 acres or 320 acres.

The Court will not be misled by references to recovery of the value of improvements. The speculative gain to the buyer is the difference between the values of land with and without water. Dr. Yellen, et al., would pay for desert land, but get irrigated land, and be free to sell it at once as irrigated land if Respondents prevail. See Dist. Br. 73-74.

^{*}According to these figures, the least that present landowners could lose if Respondents prevail is 265,000 acres x (\$1,200—\$50)/acre, or \$304,750,000. It should be noted that the actual loss would no doubt be much larger, because, while the value of desert land has remained constant, the value of irrigated land in Imperial Valley has increased substantially since Dr. Yellen executed his affidavit in 1971.

sell them; several hundred millions of dollars of net worth would be transferred. That is the object of the suit. The Solicitor General and the Yellen group, while conceding that the Secretary has no legal power to compel the owners of excess lands to sell their cultivated lands as desert, apparently believe that these owners can be coerced into doing so. Resp. Br. 172-173.

The Solicitor General, as though to justify his partisanship, emphasizes the benefits received by the District from the Project Act as though the District was the sole beneficiary. S.G. Br. 34 n. 18. This was manifestly not the case. The national character of the Project Act was repeatedly emphasized by this Court in Arizona v. California:

"[T]he question of each State's share of the waters of the Colorado and its tributaries turns on the meaning and the scope of the Boulder Canyon Project Act passed by Congress in 1928. That meaning and scope can be better understood when the Act is set against its background—the gravity of the Southwest's water problems; the inability of local groups or individual States to deal with these enormous problems; the continued failure of the States to agree on how to conserve and divide the waters; and the ultimate action by Congress at the request of the States creating a great system of dams and public works nationally built, controlled, and operated for the purpose of conserving and distributing the water.

"The prospect that the United States would undertake to build as a national project the necessary works to control floods and store river waters for irrigation was apparently a welcome one for the basin States.

"Before the Project Act was passed, the waters of the Colorado River, though numbered by the millions of acre-feet, flowed too haltingly or too freely, resulting in droughts and floods. The problems caused by these conditions proved too immense and the solutions too costly for any one State or all the States together. In addition, the States, despite repeated efforts at a settlement, were unable to agree on how much water each State should get. With the health and growth of the Lower Basin at stake, Congress responded to the pleas of the States to come to their aid. The result was the Project Act and the harnessing of the bountiful waters of the Colorado to sustain growing cities, to support expanding industries, and to transform dry and barren deserts into lands that are livable and productive.

"In undertaking this ambitious and expensive project for the welfare of the people of the Lower Basin States and of the Nation, the United States assumed the responsibility for the construction, operation, and supervision of Boulder Dam and a great complex of other dams and works (footnote omitted)." 373 U.S., at 551-552, 555, 588-589.

Without these works the Upper Basin States could not have used water from the Colorado River at all, because the lower users had already appropriated the natural flow, particularly during the low flow summer months, the same months comprising the growing season in the Upper Basin. The works constructed pursuant to the Project Act have made water available for the Central Arizona Project and for the coastal regions of Southern California. All users below Hoover Dam

in both California and Arizona have received the same benefits as the District, namely, regulated flow and relief from flooding. None of the other owners of present perfected rights in Arizona and California has been asked to pay any part of the costs of the dam and power plants.

- IV. The Most Egregious Error of the Solicitor General Is in Attempting to Write "Present Perfected Rights" Out of the Project Act and Out of This Court's Opinion and Decrees in Arizona v. California.
 - A. Section 6 of the Project Act, in requiring the "satisfaction" of present perfected rights, and Article VIII of the Compact, in providing that present perfected rights are "unimpaired," expressly determine eligibility, not just priority.

The Solicitor General argues that the doctrine of present perfected rights was merely designed to set an order of priority in the allocation of water under the Project Act to those who are entitled to receive it, but does not decide the antecedent issue of eligibility to receive that water. S.G. Br. 13. Thus, it is said, "section 6 is simply immaterial" to Congress' determination that excess lands shall not receive federal water. The notion seems to be that § 6 of the Project Act throws the ball, but § 46 of the 1926 Omnibus Adjustment Act determines who can catch it. This is the crux of the Solicitor General's case. It is a wholly mistaken concept, for several interrelated reasons.

(1) The doctrine of present perfected rights is not simply a scheme which sets "an order of priority in the

⁹ In view of the obvious differences between the Solicitor General's concept of the present perfected rights doctrine, and the concept expressed by this Court in *Arizona* v. *California*, we reproduce in Appendix D to this brief, for ready reference, the language that the Court actually used on the 16 occasions on which it referred to this subject.

allocation of water under the Project Act." It is a doctrine which confirms pre-existing property rights unimpaired.

The District's present perfected rights are those created by the irrigation of the very lands now in jeopardy, to which those rights are appurtenant as real property, under both state and federal law. Dist. Br. 32-38. The landowners, as the equitable owners of the present perfected rights, have a constitutionally protected interest therein. See Merchants' National Bank of San Diego v. Escondido Irrigation District. 144 Cal. 329, 334, 77 P. 937, 939 (1904). The District, as the legal owner and trustee, has no power to take perfected rights from the present owners of the lands to which they are appurtenant, and give them to other beneficiaries or transfer their appurtenancy to other lands (even assuming, contrary to fact, that there were other lands in the District on which that water could be applied).

(2) The Secretary has no authority, under the statute or the two decrees in Arizona v. California, to determine the "eligibility" of anyone to receive water subject to present perfected rights. This Court's opinion and decrees in Arizona v. California construed the Project Act as excluding present perfected rights from the Secretary's power to allocate stored water, of and its decrees confirmed their quantity, acreage served, and priority dates. He cannot do indirectly what the opinion and decrees prohibit him from doing directly, i.e., reallocate water in which present per-

¹⁰ 373 U.S., at 581, 584, 594; Art. II(B)(3) of the 1964 decree in *Arizona* v. *California*, 376 U.S. 340, 342. See also § 301(b) of the Colorado River Basin Project Act, 82 Stat. 887, 43 U.S.C. § 1521, implementing that article.

fected rights are decreed, by the device of vetoing eligibility of the owners of decreed acreage. Present perfected rights never belonged to the United States. They are not grants from the United States, to which the government can attach conditions, as in sales of water or grants of public lands, or licenses for the use of navigable streams. The Project Act does not authorize the United States to acquire title to them, but, to the contrary, in § 6 requires them to be served, unimpaired.

The Secretary has nothing to give, no ball to throw. Instead, he is "fettered," in the language of the Court in Arizona v. California, 373 U.S., at 581, and the Project Act requires that he honor present perfected rights in quantities and with priorities that are wholly outside any contractual allocation scheme, and are determined by state law, adopted as federal law. 373 U.S., at 594. The Solicitor General would reduce their status to that of rights sold by the Secretary, as in Ivanhoe (see infra at 48 for a discussion of that case).

(3) Even assuming, arguendo, that Congress in 1926 intended to cut off present perfected rights (without saying so) by enacting § 46 of the Omnibus Adjustment Act, the fact is that Congress, two years later, in enacting §§ 6, 8, and 13 of the Project Act, directed just the opposite result, i.e., that such rights remain unimpaired, be appurtenant to the land irrigated, and be satisfied by the Secretary's delivery of stored water. There is nothing in the Project Act or this Court's opinion or decrees in Arizona v. California which indicates that any of the District's decreed acreage of 424,145 acres is to revert to desert land values if ownership remains in the hands of those who paid the cost of bringing 2,600,000 acre-feet of water annually to irrigate that

acreage before there was any Project Act or, for that matter, any Omnibus Adjustment Act.

(4) The concept that § 6 does not determine eligibility deprives this Court's decrees in Arizona v. California of finality. In 1979-26 years after the litigation in Arizona v. California commenced and 16 years after this Court's opinion in that case—the present perfected rights in Arizona, California and Nevada were finally (we thought) adjudicated. 439 U.S., at 419. In arguing that § 6 of the Project Act does not in any way determine eligibility to receive water, the Solicitor General in effect is saying that the Secretary can undo the Court's decree. Article II(B)(3) of the 1964 decree and § 301(b) of the Colorado River Basin Project Act do not contemplate that in years of shortage, the Secretary can bypass owners of present perfected rights by determining that they are ineligible to receive water. Inasmuch as this Court held in Arizona v. California that Congress, in ordering the Secretary to deliver water in satisfaction of present perfected rights, excluded those rights from his authority to allocate water, it follows that the same mandate in §§ 6, 8, and 13 denied him authority to do this indirectly by withholding water from any of the 424,145 acres to which the decreed rights are appurtenant. This exclusion is recognized by the "except as otherwise herein provided" clause of § 14.

The whole notion that the Project Act intended that the value of present perfected rights shall be impaired in transit between the river and the land is bizarre. So also is the notion that lands in excess of 160 acres per owner, to which such rights were appurtenant on June 25, 1929, have lost those rights because the ownership of the land has not changed since that

date. These two concepts are inherent, however, in the Solicitor General's idea that § 6 of the 1928 Project Act gives, but § 46 of the 1926 Omnibus Adjustment Act takes away. Or, to put the two acts in chronological sequence, the relationship is that the 1926 Act took away in advance the assurance against impairment that the Project Act gave two years later. The Court is thus asked to believe that Congress, in the later act, did not mean what it said.

- (5) The notion that § 6 does not determine eligibility is wholly at odds with the legislative history of §§ 8 and 13 of the Project Act. Congress was told by Delph Carpenter, "Father of the Compact," that Article VIII, enjoining the "impairment" of present perfected rights, was inserted in the Compact specifically to protect landowners in Imperial Valley. Dist. Br. 27. Article VIII would not have protected landowners in Imperial Valley if it did not confirm their eligibility to receive water.
- B. Neither the Solicitor General nor Respondents cites any affirmative legislative history to support their contention that § 14 was intended to incorporate acreage limitations.

Unable to produce a single express statement in the legislative history that § 14 was intended to incorporate acreage limitations on private lands having vested water rights in the Colorado, the Solicitor General and Respondents seek to establish such an intention by implication.¹¹

¹¹ The Solicitor General refers to statements by Congressman Swing and Secretary Work which he believes support the notion that § 14 was intended to incorporate the excess land provisions of the reclamation law. However, examination of these statements and the context in which they were made reveals that they had

The Solicitor General's premise is that, since the same Congress that enacted the Omnibus Adjustment Act of 1926 considered the third Swing-Johnson bill, it must have had the 1926 Act in mind when it included what is now § 14 in that bill. This premise is refuted by the legislative history of both bills. No one in either House ever mentioned § 46 of the Omnibus Adjustment Act during the debate on either the third or fourth (final) Swing-Johnson bills. Congress obviously did not have the recent enactment of that act in mind in considering the Swing-Johnson bills.

The Omnibus Adjustment Act of 1926 originated as special legislation to grant relief to the settlers of 20 reclamation projects. Treated as emergency legislation by its proponents, it was pushed through Congress at an accelerated pace. As one member stated, "I want to say for myself, and perhaps for some others, that

nothing whatever to do with acreage limitations. Mr. Swing's statements were only to the effect that the House bill, which contained an acreage limitation, and the Senate bill, which did not, were similar. They were similar, but they had important differences, and, indeed, Congressman Swing's statements were made during an explanation of certain of those differences relating to recovery of cost and power generation. See 70 Cong. Rec. 831-837 (1928). Secretary Work's statement was to the effect that the "sale" of water under the Project Act would be pursuant to Warren Act contracts. This statement was made in a letter to the House Committee on Irrigation and Reclamation, in the context of a discussion of repayment of costs. Moreover, in subsequent testimony before that Committee, the Commissioner of Reclamation stated explicitly that sale of water under Warren Act contracts pursuant to the Project Act would not result in acreage limitations. Colorado River Basin: Hearings on H.R. 6551 and H.R. 9826 Before the House Committee on Irrigation and Reclamation, 69th Cong., 1st Sess., pt. 1 at 32-33 (1926).

we do not pretend to know much about the details of this legislation... We are accepting this bill largely upon faith; we are accepting it upon our confidence in the chairman of the committee...." 67 Cong. Rec. 8640 (1926).

Section 46 was part of a package of amendments to the administrative section of the bill offered by Congressman Cramton, after the bill was reported by the House Committee on Irrigation and Reclamation, which were accepted by the Committee prior to floor consideration of the bill. 67 Cong. Rec. 8544-8545 (1926).

When the House considered H.R. 10429 on May 3, 1926, most of the debate concerned the reasons for the failure of these particular projects, and the need for assurances that this legislation would make these projects economically viable once again. The only aspect of § 46 that was discussed was the sentence concerning the authority of the Secretary to enter into agreements with States for the selection of settlers. H.R. 10429 was passed by voice vote on May 3, 1926, without any discussion about the content or the type of contracts required by § 46. 67 Cong. Rec. 8640 (1926).

The Senate Committee on Irrigation and Reclamation reported H.R. 10429 on May 14, 1926, after making several technical changes and only a few substantive changes. An attempt to bring up the bill for consideration as soon as it was reported was defeated because few members were fully aware of the contents of the bill. *Id.*, at 9426. Nevertheless, it passed by voice vote without debate three days later. *Id.*, at 9509. The House agreed to the Senate amendments on May 18, 1926. *Id.*, at 9646.

The pending Swing-Johnson bills were never mentioned. And, as Under Secretary Carver convincingly pointed out in his criticisms of the Barry opinion (infra at 34), § 46, in its introductory language about the attraction of settlers to new projects, would lead the reader to assume that the settlement of new lands was the subject of the reference to new projects in the land limitation clause. It would not be suspected (and no one ever said during debate on either the 1926 Act or the Swing-Johnson bills) that the subject matter of § 46, instead, was the uprooting of areas long since settled, as in the case of Imperial Valley.

Furthermore, it is clear that the House Committee on Irrigation and Reclamation, which reported out both the bill that became the Omnibus Adjustment Act of 1926 and the third Swing-Johnson bill, did not consider § 14 of the Project Act as incorporating by reference § 46 of the 1926 Act, because the Committee added a new section to the Swing bill which specifically imposed a land limitation on private lands. Dist. Br. 42. (This new section survived in the fourth Swing bill until the Senate excised it by substituting and enacting the Johnson bill, which contained no such provision. Dist. Br. 42-44.) No member of either House at any time suggested, on the floor, in committee, or in a committee report, that § 14 had the effect of incorporating by reference the acreage limitation of the 1926 Act (or any other acreage limitation law) on private lands covered by present perfected rights. Dist. Br. 45-46.

In contrast to the absence of any affirmative legislative history supporting the contention that § 14 was intended to incorporate the excess land provisions of the reclamation law are the following specific instances of affirmative legislative history relied on by the District (Dist. Br. 38-46):

- (i) The explicit testimony of the author of § 14 (Congressman Swing) that a bill containing that provision did not impose acreage limitations;
- (ii) The explicit testimony of the Commissioner of Reclamation that a bill containing § 14 did not impose acreage limitations;
- (iii) Five unsuccessful efforts in the Senate (three on the floor and two in committee) to place an express acreage limitation provision in bills containing § 14 language;
- (iv) The amendment of a House bill containing § 14 language specifically to include an express acreage limitation;
- (v) The repeated statements on the Senate floor by opponents of the Project Act that bills containing the § 14 language did not contain acreage limitations.12

The Solicitor General and Respondents seek to explain away the repeated unsuccessful efforts of Sen-

¹² Respondents' statement that "[o] bjections of Senators Hayden and Ashurst were not based upon the purported failure to provide for the 160-acre limitation," Resp. Br. 133, is obviously in error. See, e.g., 70 Cong. Rec. 289 (1928), where Senator Ashurst stated that he objected to a bill containing the § 14 language but no express acreage limitation provision because:

[&]quot;[T]he bill authorizes the expenditure of millions of dollars of Federal funds to irrigate lands owned largely by privateland speculators in California in units in excess of 160 acres."

As the District Court said: "[t]he statements of Senators Phipps, Hayden and Ashurst recur too frequently and are too pointed to be disregarded." Pet. App. 100a.

ators Phipps, Ashurst and Hayden to add to the Johnson bills a land limitation on private lands (at a time when the language of § 14 was in the bill), on the ground that, after all, these Senators were in the minority in opposing the Project Act. This Court, in Arizona v. California, gave short shrift to the same argument, directed against the same Senators in the same debates:

"We recognize, of course, that statements of opponents of a bill may not be authoritative [citation omitted], but they are nevertheless relevant and useful, especially where, as here, the proponents of the bill made no response to the opponents' criticisms." 373 U.S., at 583 n. 85.

Senators Hayden, Phipps and Ashurst were not exactly back-benchers. The Court, in the immediately preceding footnote, referred to a statement of Senator Hayden as the "remark of a man so knowledgeable in western water law" (a remark which the Court construed as recognizing state law as setting the order of priorities of present perfected rights). As the Court knows, he served in Congress for 50 years, from the admission of Arizona to the Union until shortly before his death. In the 70th and decisive Congress, Senator Phipps was Chairman of the Committee on Irrigation and Reclamation that reported out the Johnson bill, S. 728, which was enacted without an acreage limitation in substitution for H.R. 5773, which contained one. He had also been Chairman in the 69th Congress, when the Committee reported out the bill (H.R. 10429) which became the Omnibus Adjustment Act of 1926. If he thought that the § 14 language in the Johnson bill incorporated by reference § 46 of the 1926 Act, he would surely have said so, as this would have made quite unnecessary his own land limitation amendments to the Johnson bill in the 69th Congress, and his substitute bill in the 70th Congress. Dist. Br. 42-46. He and Senator Ashurst, the ranking Democrat on the Committee (later Chairman of the Committee on the Judiciary), were in command of the allocation of time for debate on the Swing-Johnson bills in the 69th and 70th Congresses. Senators of the stature of Hayden, Ashurst and Phipps are listened to.

C. Respondents' contention that the "redistribution" problem will not arise because landowners will surely sell their excess land is (1) contrary to reason, (2) devoid of evidentiary support, and (3) contrary to experience in the reclamation program.

In holding that § 46 applies to deliveries from the All-American Canal to the District, the Court of Appeals reasoned that the District's present perfected rights would not be impaired by the application of § 46 because the District could simply "redistribute" the water withheld from excess lands. Pet. App. 34a.

In its brief, the District pointed out that it is physically impossible for the District to redistribute water withheld from excess lands, because all irrigable land within the District is already under irrigation; there is simply no place within the District's borders that water withheld from excess lands can be put to beneficial use. Consequently, if § 46 is applied, present perfected rights will be impaired to the extent that water subject to such rights is withheld from delivery and not put to beneficial use.

The United States' brief is silent on the problem of redistribution.

Respondents Yellen, et al., argue that the redistribution problem will not arise because landowners in the District will surely sell their excess lands when § 46 is applied, and upon such sale the lands will be eligible to continue receiving water. Resp. Br. 30, 172. Indeed, Respondents Yellen, et al., label as "pure sophistry" any notion that, if § 46 is imposed, the Secretary will deliver less than the decreed quantity of water to less than the decreed quantity of land. Resp. Br. 105.

Yet plain common sense suggests that landowners will not sell excess lands at the prices suggested by Dr. Yellen even if denied water for those lands. If acreage limitations are applied to Imperial Valley, landowners will receive project water for 160 acres whether or not they sell their excess lands. And if they can only get \$25 to \$50 per acre for excess lands—2% to 4% of its value—as Dr. Yellen indicates in his affidavit, why should they sell? Even if the land had no value for purposes other than farming, and even if water were not available except through the All-American Canal, it is doubtful that landowners would sell their excess lands for a nominal sum—in effect, give such lands away—since they would get project water for 160 acres in any event.

The Solicitor General himself says (S.G. Br. 56 n. 29) that "Congress is the branch of government best suited to settle the excess-acreage question in a manner that fairly takes account of the wide range of competing interests, both public and private, at issue in this case," and calls attention to S. 14, 96th Congress, which, among other things, "would exempt the Imperial Valley from the excess-acreage limitation," and has passed the Senate. S.G. Br. 55 n. 29. (He neglects to say that the Secretary reported adversely on this exemption, and testified against it.) Landowners deprived of wa-

ter would logically wait for legislation, in some new administration, as a better alternative to selling longcultivated lands as desert, losing 96 to 98 percent of the value of their excess lands.

Moreover, the District would face a serious legal and financial problem: could it lawfully collect assessments from the owners of lands to which it is prohibited from delivering water, perhaps amounting to more than one-half the acreage in the District, according to Respondents' figures?

Indeed, there was no finding by the District Court to the effect that landowners in the District would in fact sell their excess lands if denied project water for those lands, and no evidence in the record to support such a finding.¹³

They refer to testimony before Congress by Imperial's Chief Counsel, Harry W. Horton, where Mr. Horton said that in his opinion one "Jack O'Neill" would be willing to execute a recordable contract. But Jack O'Neill did not own property in Imperial Valley. His property was located near the San Luis Project, 400 miles to the north. Hearings on S. 1425, 2541, and 3448, Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 85th Cong., 2d Sess. 88 (1958). The testimony of Mr. Horton relied on by Respondents had nothing to do with Imperial Valley or the willingness of landowners there to sell the excess lands.

Respondents also refer to testimony at the trial in 1971 to the effect that land in Imperial Valley could only be used for farming. Resp. Br. 172. Since then, however, considerable acreage within the District's boundaries has been leased for geothermal exploration and industrial uses.

We are aware of no statement in the record of this case, made on behalf of landowners in the Imperial Valley, to the effect that such landowners would sell their excess lands if denied project water for those lands.

In support of their contention that landowners in the District will surely sell their excess lands if denied project water therefor, Respondents make the remarkable statement that:

"Experience in the reclamation program shows that excess landowners never hesitate to execute recordable contracts." Resp. Br. 89.

The patent invalidity of this contention is nowhere better illustrated than in California. Following the Ninth Circuit's decision in *United States* v. *Tulare Lake Canal Company*, 535 F.2d 1093, cert. denied, 429 U.S. 1121 (1977), holding that § 46 applies to private lands in the Central Valley receiving irrigation benefits from the King's River Project, King's River landowners refused to execute recordable contracts, and announced their intention to revert to pre-project operations. Landowners receiving irrigation benefits from the Kern River Project have stated their intention to do the same thing if the government insists on the execution of recordable contracts there.

¹⁴ Indio Daily News (April 5, 1978), reporting a statement made before the Subcommittee on Water and Power of the House Committee on Interior and Insular Affairs at a field hearing held in Fresno, California, concerning amendments to the 1902 Act. Acreage limitations apply only to "project water," i.e., water which is released at times when it would not be available but for the federal project. Landowners electing not to sell their lands may continue to use pre-project water supplies. See Ivanhoe Irrigation District v. McCracken, 357 U.S., at 285-286.

¹⁵ Reclamation Reform Act of 1979: Hearings before the Subcommittee on Energy Research and Development of the Senate Committee on Energy and Natural Resources, 96th Cong., 1st Sess. 492 (1979).

D. The fact that acreage limitations have been applied to Coachella is irrelevant because Coachella has no present perfected rights.

The Solicitor General and Respondents Yellen, et al., make repeated reference to the fact that Coachella Valley, which is served by the All-American Canal, is subject to acreage limitations. S.G. Br. 29 n. 13, 39 n. 20, 59; Resp. Br. 54, 85, 87, 136, 145. They argue that the Project Act does not distinguish between Coachella Valley and Imperial Valley, and therefore acreage limitations should apply to Imperial Valley as well. The problem with this argument is the fact that there are not, and never have been, present perfected rights in Coachella Valley. See Judge Turrentine's comment, Pet. App. 106a-107a. Thus, § 6 of the Project Act—as well as Article VIII of the Compact and this Court's 1964 and 1979 decrees in Arizona v. California-has no application to Coachella Valley. Section 14 of the Project Act can incorporate the acreage limitation provisions of the reclamation law with respect to Coachella, without conflicting with § 6. Thus, the fact that acreage limitations apply in Coachella is irrelevant to the question of whether they apply in Imperial.

V. The Wilbur Decision, the Harper and Barry Opinions, and Subsequent Administrative Practice.

Secretary Wilbur's Decision

This suit is basically a challenge to the letter-ruling of Secretary of the Interior Ray Lyman Wilbur in 1933 that the 160-acre limitation "does not apply to lands now cultivated and having a present water right" in Imperial Irrigation District irrigated from the All-American Canal, and that "these lands, having already a water right, are entitled to have such vested

right recognized without regard to the acreage limitation mentioned." A. 177a.

The Wilbur holding, although adhered to for the next 31 years by six Secretaries in four Presidential administrations (and subsequent to the initiation of this suit, by a seventh Secretary, Rogers C.B. Morton), is now sought to be reversed on the following grounds:

- (1) It is said that "[i]t is an interpretation made after enactment of both statutes and consequently never before Congress when the Project Act was being considered." S.G. Br. 64-65 n. 35, quoting the Court of Appeals. Of course. It was an administrative construction made by the officer charged with the administration of the act, the man bearing the responsibility for putting the new statute into motion and making its parts run smoothly, Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933), and who was charged by § 4(b) of the Project Act with the responsibility for obtaining repayment contracts as a precondition to seeking appropriations for construction.
- (2) It is charged that Wilbur's holding was an interpretation of § 5 of the 1902 Act, whereas the question Secretary Wilbur ought to have decided was the applicability of § 46 of the 1926 Act, although § 5 was the only excess land law cited in the allegation that he was answering. But this Court, in *Ivanhoe*, thrice termed § 46 of the 1926 Act a "reenactment" of § 5 of the 1902 Act, 357 U.S., at 278 n. 2, 289, 290, and devoted its own discussion almost entirely to § 5. If one statute was inapplicable to lands possessing a present perfected right within the meaning of § 6 of the Project Act, both statutes were. The Chief Counsel of the Bu-

reau of Reclamation (Mr. Dent) on March 1, 1933, so advised the Bureau attorney who was monitoring the Hewes case:

"In my view the acre principle discussed in the Secretary's letter of February 24, based upon section 5 of the reclamation act, involves precisely that contained in section 46 of the act of May 25, 1926. The latter act merely ties up with and emphasizes what has always been the law in this respect." A. 179a.

(3) The Solicitor General, at S.G. Br. 62, apparently adopts Mr. Barry's statement that "'[t]he record is ambiguous as to whether the Department had actually determined the excess land laws not to be applicable to Imperial Irrigation District prior to the execution of the contract," challenging the veracity of the statements of Secretary Wilbur and of Chief Counsel Dent that this determination had been made "early in the negotiations." There is nothing ambiguous about it.

Former Solicitor Weinberg, who participated in drafting the Barry opinion, conceded in cross-examination in the present case:

- Q. "In 1932, it's a fact, is it not, that the acreage limitation clause was initially put in the drafts of the contract, and then physically deleted?"
- A. "Yes, that is a fact." Tr. 221.

Moreover, the decision was made even earlier than 1932. The record shows that the contract article which recites the applicability of the reclamation law went through numerous drafts. In the draft of *November* 12, 1930 (Defendants' Exhibit AB), the applicability

of the land limitation law was treated in Article 29 as follows:

"LIMITATION OF RECLAMATION LAW. ART. 29.

"The delivery of water under the terms and conditions hereof, and the operation and maintenance of the works to be constructed hereunder, shall be subject to and controlled by the limitations of the Reclamation Law. . . ."

Article 29 of the draft of November 12, 1930, was changed by the draft of *April 29*, 1931 (Defendants' Exhibit AC). In this draft, Article 31 provided:

"LIMITATIONS OF RECLAMATION LAW. ART. 31.

"Except as provided by the Boulder Canyon Project Act, the Reclamation Law shall govern the construction, operation, and maintenance of the works to be constructed hereunder."

Finally, in the draft of September 24, 1931 (Defendants' Exhibit AD), Article 30 of the contract of December 1, 1932, appeared in its present form for the first time. Article 30 of that draft provided:

"APPLICATION OF RECLAMATION LAW. ART. 30.

"Except as provided by the Boulder Canyon Project Act, the Reclamation Law shall govern the construction, operation and maintenance of the works to be constructed hereunder."

In other words, the expression "delivery of water" in the draft of November 12, 1930, was deleted in the draft of April 29, 1931, and subsequent drafts; the application of the reclamation law in the draft of

April 29, 1931, and subsequent drafts was specifically limited by the phrase, "Except as provided by the Boulder Canyon Project Act"; and the caption "Limitations of Reclamation Law" was changed to "Application of Reclamation Law." The language in that form remained unchanged in the contract which Secretary Wilbur approved as to form in an opinion dated November 3, 1931 (signed also by the Solicitor, the Commissioner of Reclamation, the Reclamation Bureau's Chief Counsel (Assistant Commissioner), and the Secretary's two Executive Assistants, after a public hearing October 22, 1931).16 The public hearing was held after notifying all parties who had expressed any interest in the All-American Canal contract. No one asked to be heard on the excess land question. All persons who asked to be heard were heard, by the Secretary in person.17 The contract was executed December 1, 1932.18

It may be useful at this point to recount how the Wilbur ruling came to be made, since this also is called in question. On February 7, 1933, Mr. Porter Dent, Assistant Commissioner and Chief Counsel of the Bureau of Reclamation, who had been in charge of negotiating the All-American Canal contract, wrote Secre-

¹⁶ This sequence of changes was acknowledged at trial by government counsel. Tr. 555.

¹⁷ U.S. DEPARTMENT OF THE INTERIOR, THE HOOVER DAM CONTRACTS, 563-569 (1933).

¹⁸ The 13-month interval between approval as to form and execution was due to Coachella Valley County Water District's reconsideration of a proposed merger with Imperial Irrigation District. Coachella decided to negotiate a separate repayment contract. The Hoover Dam Documents, House Document No. 717, 80th Cong., 2d Sess. 121 (1948).

tary Wilbur's Executive Assistant, Mr. Northcutt Ely, reporting the issue that had arisen in the confirmation action (*Hewes*) with respect to the applicability of the land limitation. Ex. AM, A. 219a. He said that the District was concerned, and wanted a statement of the Department's views. He said, *inter alia*:

"Early in the negotiations connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this proposed canal. So far as I am advised, all who have given this matter consideration agree that this limitation does not apply to lands now cultivated and having a present water right. The view has been, and is, I believe, that these lands having already a water right, are entitled to have such right recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested water right when the provision was inserted that no charge shall be made for the storage, use or delivery of water to be furnished these areas.

"This matter is submitted for your consideration and such action as may be considered advisable. If the Department is in agreement with the foregoing I believe a letter to the district or a formal decision to that effect would be helpful (emphasis added)." A. 220a-221a.

The Secretary concurred, and directed, through Mr. Ely, that Mr. Dent prepare a letter to the District along the lines recommended by Mr. Dent. A. 223a. Mr. Dent did so, and the Secretary signed it February 24, 1933. Ex. AO, A. 224a. A comparison of Secretary Wilbur's letter with Mr. Dent's memorandum (A. 219a), dated February 7, shows that the operative language in the

two is substantially identical. In other words, the original recommendation and the final letter incorporating that recommendation both came up to the Secretary through routine channels from the Chief Counsel of the Reclamation Bureau, the lawyer in the Department best qualified to decide the question raised in the Hewes case. Secretary Wilbur approved Mr. Dent's recommendation, unchanged. Mr. Dent, Assistant Commissioner and Chief Counsel, was a 20-year career lawyer in the Interior Department and compiler of the Department's publication, Federal Reclamation Laws (1931). Mr. Dent's ability and integrity were above challenge.

(4) It is said that Secretary Wilbur signed his letter to the District only a few days before he left office, as though this were relevant. Solicitor General Griswold answered this innuendo in his memorandum of April 8, 1971, as follows:

"It is said that the action by Secretary Wilbur in February, 1933, was taken in the dying days of the Hoover administration, and therefore, for some reason, is not entitled to great weight. These were, however, the officers who had been responsible for the construction of the Hoover Dam, and who had carried out all of the negotiations under the Boulder Canyon Project Act, and particularly those with respect to the All American Canal. They were the ones who were then charged with the administration of these statutes. It is hard for me to think of officers who would have been better qualified to know what the appropriate resolution of this problem was. Moreover, they could well have felt that it was not fitting to let such a matter go over to the new administration, since they were directly responsible for it, and had the experience to deal with it.

"On this matter, it seems to me significant, too, that no steps were taken by the immediately succeeding administration to upset the determinations made in February, 1933. If there had been serious doubts about this, it seems clear that they would have been raised in the Franklin D. Roosevelt administration. If prompt doubts had been raised, we would not have a long continued administrative construction, and the situation today would be very different. But the initial questions were raised about this only in the mid 1940's, and only with reference to another valley served by the project. Application to the Imperial Valley was soon denied, and no action was taken which directly opposed the conclusion of Secretary Wilbur in the Imperial Valley until the opinion of the Solicitor of Interior on December 31, 1964.

"This was more than 31 years after Secretary Wilbur's determination. Whether there was any political motivation in this, I do not regard it as relevant. The significant thing, it seems to me, is that the prior determination had then been outstanding for 31 years, had been widely understood and accepted, and had been extensively relied upon."

(5) And, finally, it is said that Secretary Wilbur was wrong as a matter of law. The short answer is that he construed the Project Act in the same way that this Court did in Arizona v. California, 376 U.S. 340 (1964), as requiring the satisfaction of vested rights, and that his opinion was in accord with the controlling precedents and the specific regulations of the Department, which have been in effect from 1910 down to this day. Secretary Wilbur was right on the

¹⁹ 43 C.F.R. § 230.70. See, to the same effect, 3 C. Kinney, Law of Irrigation and Water Rights 2309 (2d ed. 1912), and discussion Dist. Br. 66-67.

merits, quite aside from the deference shown to his decision by seven subsequent Secretaries and Solicitor General Griswold.

The Solicitor General disputes our assertion that the Wilbur ruling with respect to Imperial Valley was adhered to, as Judge Turrentine put it, by six succeeding Secretaries in four Presidential administrations. A. 108a-109a. He says that it was "soundly discredited" (S.G. Br. 64) in an opinion by Solicitor Harper of the Interior Department in 1944 (A. 230a), as well as by an opinion by Solicitor Barry in 1964 (A. 182a). This is very thin gruel, as we shall see. Moreover, the Department reverted to Secretary Wilbur's reasoning in 1963, in dealing with vested rights on the Sacramento River, a year before the Barry opinion (infra at 37).

Solicitor Harper's 1944 Opinion

Mr. Harper's opinion (A. 230a) held the excess land provisions of the reclamation law applicable to lands in Coachella Valley, which had no present perfected rights, but he was careful to leave Secretary Wilbur's decision untouched as to Imperial. It is true that he criticized Secretary Wilbur's decision, but, as Judge Turrentine pointed out, Mr. Harper seemed inexplicably ignorant of the existence of present perfected rights in Imperial Valley. Mr. Harper said "nothing in the files indicated whether such is the factual situation" Judge Turrentine's castigation of Mr. Harper's carelessness deserves rereading:

"There was of course ample data then available to show that in Imperial Valley there were in ex-

²⁰ The numbers, it is now known, can be increased to seven Secretaries in five Presidential administrations, to include Secretary Morton in the Nixon Administration. See *infra* at 257a.

cess of 400,000 acres receiving pre-project irrigation in reliance on rights to Colorado River water. The major weakness of the Harper decision as it relates to Imperial Valley is its failure to deal with this question of pre-project water rights. There was much discussion of how section 14 of the Project Act made that act a supplement to reclamation law, but no discussion of congressional recognition of pre-existing rights under the Colorado River Compact found in sections 6, 8, and 13 of the Project Act." Pet. App. 106a.

The United States carries this same error into its brief. S.G. Br. 18, 28-29, 39.

Solicitor Barry's 1964 Opinion

It is significant that Solicitor Barry's opinion (A. 182a), although it was dated December 31, 1964, more than 18 months after this Court's opinion in Arizona v. California (June 3, 1963), and more than nine months after the initial decree in that case (March 9, 1964), does not once mention either the opinion or the decree. The subject of present perfected rights, referred to some ten times in the Court's opinion, and made the subject of specific definition in the decree, was mentioned by Mr. Barry only once, and then in conclusory terms: "Section 6 cannot be read as insulating the District lands from acreage limitation."

Barry's omissions of all reference to the treatment of present perfected rights in this Court's opinion and decree are all the more remarkable because the Barry opinion had been secretly under preparation for some eight months (commencing after the decree had been handed down), without notice to the District or opportunity for it to be heard. Tr. 210-212.

The Barry opinion was put in its true light as a "partisan brief" by the comments upon it submitted by Under Secretary John A. Carver, Jr., it to Secretary Stewart Udall (Defendants' Exhibit CQ):

"The opinion is long on protestations of certitude, but the supporting documentation constitutes a usefully thin skein of separate statutes laid end to end with only the doctrine of pari materia to provide the linkage. To put it another way, the opinion might well suffice as a partisan brief to defend or justify total disruption of a multi-million dollar industry in support of some compelling policy objective. But it is less than persuasive in laying the groundwork for a conclusion that such action is required by law.

"This fault lies primarily in the fact that the opinion fails or neglects to consider the possibility of any other conclusion and, having done so, does not dispose of counter arguments which have at least a surface appearance of validity. Among these I would enumerate the following:

"a. Key reliance is placed on Section 46 of the 1926 Omnibus Adjustment Act, or at least one sentence therein. But the section itself refers to 'proposed construction of the irrigation works' in apparent contemplation of a wholly new development of irrigated land. Moreover, the immediately preceding sentence of the same section is concerned with Federal-State cooperation in prompting the settlement of the projects or divisions after completion and in the securing and selecting of settlers.' The implication seems clear that Congress was looking to Federally sponsored future developments. Yet in 1926 when this act was passed, in 1928 when the

²¹ Mr. Carver was subsequently a member of the Federal Power Commission, and Professor of Law at the University of Denver.

Boulder Project was approved and in later years when water first became available through the All-American Canal, the Imperial district was a going concern with a fully developed distribution system and an established pattern of land ownership. Query: Under this fact situation and the prospective language used in the act, did Congress intend to force acreage restrictions where the only effect was to change the method of delivering water to an existing district already developed through private initiative?

"b. The doubt expressed above is further reinforced by the policy which Congress expressed in Section 48 of the same act. That section, as codified at 43 USC 423f, states the purpose of the legislation to be 'the rehabilitation of the several reclamation projects and the insuring of their future success by placing them upon a sound operative and business basis' and directs the Secretary of the Interior 'to administer [the act] to those ends.' The act was, in fact, a general relief measure aimed at canceling out deficits which were strangling some 20 Federal irrigation projects. Imperial was not one of those areas treated in the act. Congress quite obviously did not have it or its situation in mind in enacting Section 46. Query: In what manner would the belated application of Section 46 to the Imperial District serve the purposes and objectives which Congress specified in enacting the 1926 act?

"c. Similarly, Congress left no doubt as to its over-all objectives in enacting the Boulder Project Act. Section 6 enumerates the purposes to be served by construction of the dam and reservoir, including 'satisfaction of present perfected rights in pursuance of Article VIII of [the] Colorado River compact.' Article VIII specifies that 'Present perfected rights to the beneficial

use of waters of the Colorado River System are unimpaired by this compact.' The legislative history of the Boulder Project Act makes it clear that the Congressional committees regarded the Imperial District lands as having present perfected rights to these waters. I am strongly of the view that any Congressional intent to alter or change the ownership of such rights must be found in specific terms, rather than implied from general language of dubious applicability.

"In summary, the opinion before you invokes the in pari materia doctrine to splice together enough cloth to reach its conclusion. In so doing, however, it violates an even more basic rule of construction, namely that all of the sections of a statute must be weighed and given weight."

Secretary Udall nevertheless continued on his way.

Whatever the merits, or lack thereof, in the Harper and Barry opinions, it is clear that they were in turn overruled insofar as the effect of the 1933 Wilbur determination is concerned by the 1971 opinion of Solicitor Melich (reproduced *infra* at 258a), who agreed with Deputy Attorney General Kleindeinst and Solicitor General Griswold that the Wilbur decision should be left undisturbed, and that no appeal should be taken from Judge Turrentine's decision to that same effect.

Administrative Exemptions

Our opponents rely heavily on the following statement in *Ivanhoe*:

"Significantly, where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such exemption by express enactment." 357 U.S., at 292.

The Court was relying upon assurances in the government's amicus brief that were not strictly accurate even when made in 1958 (viz. the Department's 1910 regulations, still in force, exempting "larger areas" owning vested rights from land limitations; 38 L.D. 637 (1910), 43 C.F.R. § 230.70), and that became grossly inaccurate in 1963, when the Sacramento River "diverter contracts," relating to diversions from the Sacramento River of water stored by Shasta Dam, pursuant to the Central Valley Project Act, 50 Stat. 844, were entered into by the same Secretary who caused the present suit to be filed. The Solicitor General's repetition of this representation in 1980 is explainable only on the assumption that the Secretary has not told the Department of Justice about the Sacramento diverter contracts.

The Final Report of the National Water Commission to the President, WATER POLICIES FOR THE FUTURE (1973), stated:

"4. Some landowners and districts obtained exemption when water under U.S. Bureau of Reclamation (Bureau) control is [sic] declared to be natural flow, in which the landowners or districts had rights antedating the construction of the project. The most notable example of this exemption is found in the Sacramento River Diverter contracts executed in connection with the Shasta Dam project in Northern California." Id., at 143.

Examination of the Commission's underlying study, H. Hogan, Acreage Limitation in the Federal Reclamation Program (1972) ("the Hogan Study"), cited in support of these statements, shows that the quantities involved in the Sacramento diverter contracts were very substantial. The Hogan study reported:

"The San Luis Act of 1960 (74 Stat. 156) contemplated the delivery of Sacramento River south

to the San Joaquin Valley. The ability of the Bureau of Reclamation to make the delivery required that a ceiling be placed on the right of riparian users along the Sacramento River to divert the water from the river. North of Sacramento in 1963 such users diverted annually about 2,500,000 acre feet from the river to service about 900,000 acres. After years of negotiation diverter contracts were signed on December 27, 1963 between the Secretary of the Interior and the riparian users. The diverter contracts designated about 70 percent of the diverted water to be private 'base rights' to which the acreage limitation did not apply.

"The 'base' supply recognized by the diverter contracts was vastly inflated. It bore no relation to any legal theory." *Id.*, at 132, 134.

The study quotes a report of the Comptroller General to Congress dated October 18, 1968, stating:

"These contracts will, in GAO's opinion, permit the water users to use annually, without charge, 950,000 more acre feet of water, having a contract value of \$2 an acre foot, than was available for use in an average year prior to the operation of Shasta Dam and Reservoir." Id., at 135.

The Hogan study continues:

"The maximization of the 'base' figure minimized the 'project' water and with it the quantity of land that had to submit to the acreage limitation...

"The diverter contracts recognized the existence of the acreage limitation and effectively nullified it in practice. . . . Of 198,341 excess acres, 198,009 are able to dispense with water designated by the diverter contracts as project water." *Id.*, at 135-136.

Not only were these Sacramento River "diverter contracts" executed in the administration of the same Secretary who recommended the filing of this lawsuit against Imperial, but, mirabile dictu, the Department's Solicitor at the time was Mr. Frank J. Barry.

VI. The Solicitor General Misconstrues the Issue of "Finality".

Whether the Wilbur decision in 1933 was right or wrong (and it was plainly right), it was not open to reversal by a subsequent Secretary some 34 years later. Principles of administrative and judicial finality preclude such gyrations. The present Solicitor General's arguments, based on the premise that the United States was not a party to the *Hewes* case in 1933, miss the point.

A. The 1933 in rem judgment in the Hewes case is dispositive of the present suit for three related but independent reasons:

(1) The Hewes in rem judgment, in proceedings required by 43 U.S.C. § 511, is res judicata as against Yellen, et al. That being so, Respondents lacked competence to litigate all over again the applicability of the acreage limitation laws in Imperial Valley in the guise of an appeal taken from a judgment against the United States in a district court case in which they were not parties. We put to one side the additional question of whether a stranger can intervene to reverse the decision of the Solicitor General not to appeal a judgment against the United States with which the Solicitor General was satisfied, and thereby cause the United States to be bound by a different result in an appellate court, reached on arguments not presented by the United States. The Solicitor General, not some volun-

teer, has authority to make the decision whether or not to appeal. See 28 C.F.R. § 0.20(b), and Solicitor General Griswold's memorandum, infra at 249a. Cf. Thompson v. United States, — U.S. —, 62 L.Ed.2d 457 (1980).

(2) If Yellen, et al., lacked competence to appeal, the case was not properly in the Court of Appeals, and it is not properly in the Supreme Court. The District Court judgment would plainly be res judicata against the United States, if it were not for Dr. Yellen's appeal. The Solicitor General is properly here only in the capacity of amicus curiae, arguing Respondents' case. The question is not, as the Solicitor General implies (S.G. Br. 68 n. 38), whether the United States is bound by the Hewes judgment. It is not necessary to reach that point, as it might have been if the government had appealed from the District Court judgment.²²

²² If the United States were a party on appeal, it might very well find its suit precluded by this Court's recent decision in Montana v. United States, 440 U.S. 147 (1979), which held the United States to be subject to collateral estoppel by a state court judgment rendered in circumstances strikingly similar to those which resulted in the Hewes decision. There, as here, (1) the United States required its contractor to file a test suit in a state court (in the case of Hewes, this requirement was statutory and was made explicit in the government's contract with the District (Art. 31, Pet. App. 31)); (2) the United States was not a party; (3) the government submitted a brief in the state court (in Hewes, a letter ruling of the Secretary); and (4) the government effectuated the abandonment of an appeal which challenged the trial court's judgment. In the case of Hewes, unlike that in Montana, the judgment was in favor of the side supported by the Secretary, and the Secretary (Ickes) got rid of the appeal by refusing to allocate funds for construction until the appeal was abandoned. When it was abandoned, the Secretary represented to Congress that the contract thus confirmed complied with the requirements

The question as to *Hewes* is not necessarily whether the government is bound by that judgment, but whether the government's voluntary protector and champion, Dr. Yellen, is bound. He plainly is. Lacking competence to relitigate *Hewes* on his own behalf, he certainly lacked competence to do so on behalf of the United States in the teeth of Solicitor General Griswold's decision to abide by Judge Turrentine's judgment.²³

(3) As against the United States, the proceedings under 43 U.S.C. § 511, resulting in the *Hewes* judgment, have acquired finality, whether or not the judgment was technically res judicata ²⁴ against the United

of § 4(b) of the Project Act, and Congress, agreeing, appropriated construction money.

The Hewes confirmation proceedings accomplished their statutory purpose, and the United States, if it comes to an issue of collateral estoppel, is precluded from now asserting a construction of the Project Act and contract opposite to that which it presented to the state court, and which that court confirmed.

²³ It is proper to note here that Dr. Yellen was disqualified to prosecute this appeal for an independent reason. Even if the *Hewes* judgment had never been entered, Yellen, *et al.*, lacked standing in the present suit, or, if they once had it, they lost it while this case was on appeal, for the reasons stated in Dist. Br. 75-83.

²⁴ The Solicitor General says, erroneously, that the defense of res judicata was not asserted against the United States as plaintiff in the District Court. S.G. Br. 68 n. 38. This statement is mistaken, although it is practically a quotation from the Ninth Circuit's opinion. Pet. App. 24a. Both the District and the intervening landowners raised the defense of res judicata in their answers to the complaint in the District Court. The District in paragraph VII of its answer referred to *Hewes* and alleged: "... that said contract, 'Exhibit A' as written, and as well said confirmatory judgment are, and each of them is, binding upon the United

States, and not necessarily because of equitable estoppel arising from that judgment (but see Montana v. United States, 440 U.S. 147 (1979)). It is not a mere matter of "comity" (the Solicitor General's expression); finality is compelled because the result reached by the state court was accepted by the United States as the basis for a contract with the District, performed on both sides for 34 years. Finality of the bargain was achieved, over the years, when Congress, informed of the Hewes decision, repeatedly appropriated money to build the canal; when works were built for the government in reliance on Hewes; and when the District, in reliance on Hewes, undertook a new debt of \$25,000,000, abandoned its Mexican canal, and became dependent on the new works. These actions, cumulatively, amounted to a good deal more than the "expectancies" which ripened into finality in Kaiser Aetna Co. v. United States, — U.S. —, 62 L.Ed.2d 332, 346 (1980). As this Court said in Ivanhoe, "Such a record [of congressional awareness] constitutes ratification of administrative construction, and confirmation and approval of the contracts." 357 U.S., at 293-294. This is especially true in this case, because the government's contract with the District was submitted by Secretary Ickes to Congress as evidence of compliance with the requirement of § 4(b) that the Secretary have in hand

States." A. 308a. Also, in paragraph XII of its answer, the District repeated: "... that said judgment is conclusive on the Plaintiff herein." A. 309a. The intervening landowners in section VI of their answer entitled "Contention Re Res Judicata" recited the facts concerning the validation proceeding in Hewes and concluded: "As a result, the judgment in the Hewes case is binding on the United States and upon each and all of said persons and parties, all as contemplated by 43 U.S.C. § 511 above mentioned." A. 296a.

a repayment contract before requesting appropriations for construction. Congress made the appropriations. Mr. Ickes was in office during the entire time that the canal was under construction.

B. The Solicitor General's arguments about Hewes

The Solicitor General offers three arguments as to why Dr. Yellen, et al., are not bound by the in rem judgment in the Hewes case: (i) the resolution of the question of whether acreage limitations applied to lands in Imperial Irrigation District having present perfected rights was not necessary to a decision as to whether or not the contract between the United States and the District was valid under federal and state law, S.G. Br. 70-72; (ii) a state court cannot decide questions of federal law, S.G. Br. 71; and (iii) subsequent events justify liquidation of the res judicata effect of that judgment, S.G. Br. 72-76. All three positions are unsound.

1. The applicability of land limitations had to be decided in Hewes

If the Hewes court had held (as the Ninth Circuit did) that the Project Act required inclusion of a land limitation in the contract, the Hewes court would have had to hold the contract invalid, not only because the contract did not contain such a clause, but because both parties to that contract were in agreement that (i) the exclusion was deliberate and that (ii) no such limitation was required because of the existence of vested rights to water from the Colorado River.

If the *Hewes* court had held an acreage limitation to be applicable, the only recourse would have been to amend the contract to include such a limitation and to

submit that contract to the voters for approval. If it is assumed that the voters would have approved such a contract, two key questions would have been generated, to be litigated in a new confirmation proceeding under 43 U.S.C. § 511: (i) the constitutionality, under federal and state law, of a contract which prohibited delivery of water to lands to which present perfected rights were appurtenant unless their owners would sell those lands as desert, without compensation for the water rights taken, and (ii) whether the District. as trustee for those lands, had competence to enter into a contract which deprived them of the value of their water rights.25 The conclusion of the Ninth Circuit would force on the District, retroactively, a contract that its voters had never approved and that had never been judicially confirmed in an in rem proceeding as required by federal and state statutes. This is highlighted by the fact that in 1952, a different Secretary, in negotiating a new contract with the District, deliberately refrained from trying to include a land limitation because he knew that such a contract would not be accepted by the District's voters. See Judge Turrentine's comment, Pet. App. 107a n. 29.

2. Congress may authorize a state court to decide questions of federal law, and the purpose of 43 U.S.C. § 511 could not have been accomplished without such a determination in this case

The Hewes decision was not res judicata, the Solicitor General says, because "the court improperly de-

²⁵ It bears repetition that this is the exact result contended for by the Solicitor General (S.G. Br. 22) and the Yellen group (Resp. Br. 169, 171). Dr. Yellen adds that only by selling their land at its ex-water right value can the owners of "some of the finest farmland in the world" (Resp. Br. 170) obtain payment for their improvements (Resp. Br. 172-173).

parted from the issue before it in *Hewes* and impermissibly addressed more general questions of the applicability of the excess-acreage limitation, not under the contract, but rather directly under the statutes." S.G. Br. 71.

43 U.S.C. § 511, delegating jurisdiction to state courts to determine the validity of a contract between the United States and an irrigation district, cannot be given this restricted reading. The *Hewes* court had to examine the question of whether or not federal law laid upon the District the duty of withholding water from lands in excess of 160 acres, before it could pass upon the question of whether the District had competence under state law to accept and enforce such an obligation.

It is clear that the state court could be given jurisdiction to determine limited questions of law, federal or state, subject to review by this Court. United States v. District Court for Eagle County, 401 U.S. 520 (1971); Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). These cases made explicit what should have been clear as a matter of first principle from the necessities of the federal system: state courts are and must be entrusted with jurisdiction to decide questions of federal law; federal courts to decide questions of state law. Federal question issues may indeed be forced upon reluctant state courts for decision. Testa v. Katt, 330 U.S. 386 (1947).

3. "Later events" have not dissolved Hewes

The Solicitor General's next line of argument is even thinner. State Farm Insurance Co. v. Duel, 324 U.S.

154, 162 (1945), and Commissioner v. Sunnen, 333 U.S. 591, 599-600 (1948), are relied on to bring this case within the exception to res judicata or collateral estoppel where there has been an "intervening decision or a change in the law." S.G. Br. 73-74. Both are taxation cases. Duel is a case where the government sought unsuccessfully to rely on res judicata, despite a change of state judicial decision in the controlling law of spendthrift trusts. Sunnen is a case where collateral estoppel was not allowed to provide a taxpayer with a perpetual tax exemption. Annual tax liability, of course, is never the subject of a rule of property.

Here, on the other hand, the subject matter is not taxes, but water rights. The water rights, as the government points out, are all-important. They make the difference between land worth at most \$50 an acre without water and land worth \$1400 with water. S.G. Br. 22. These rights, appurtenant to the land, are real property, worth far more than the land itself. Permanence of the supply is essential, as § 5 of the Project Act recognizes. The necessity that a right to water be specific, firm, and permanent was the reason for the years of litigation in *Arizona* v. *California*.

Moreover, the four "changed circumstances" relied on by the Solicitor General confirm, rather than detract from, the result in *Hewes*:

(1) "The Interior Department's continued consideration of the question, culminating in Solicitor Barry's formal opinion in 1964." S.G. Br. 73. Quite aside from the obvious flaws in Mr. Barry's opinion (e.g., its failure to consider or even mention the opinion and 1964 decree of this Court in Arizona v. California as

to the effect of present perfected rights),26 it was scarcely evidence of "continued consideration" of the land limitation question. The Barry opinion came along 31 years after the 1933 Wilbur decision; 30 years after the dismissal of the appeal from the Hewes judgment (on Secretary Ickes' insistence) in 1934; 22 years after completion of the All-American Canal and the District's consequent abandonment of its Mexican canal in 1942; 17 years after Secretary Ickes' decision (notwithstanding the Harper opinion) not to reopen the Imperial question when he executed the 1947 Coachella distribution canals contract (Pet. App. 105a); 16 years after Secretary Krug refused in 1948 to reconsider the Wilbur decision (Pet. App. 105a); and 12 years after Secretary Chapman decided not to attempt to put a land limitation clause into a new Imperial contract that he signed in 1952 (Pet. App. 107a). All of the "continued consideration" before Barry came along resulted in leaving the Wilbur decision undisturbed. The 1964 Barry opinion, as we now know from the sworn testimony of his successor, Solicitor Weinberg, in this case, was prepared in secret over an eight-month period, commencing after the opinion and decree in Arizona v. California, and without giving the District notice or opportunity to be heard. Tr. 210-212. This was not exactly a viable escape route, 31 years after the event, from a state court judgment and a decision of the Secretary, even assuming that somehow "continued consideration" is a talisman that would enable this to be done.

Beyond this, we have never before heard it asserted that a Solicitor's opinion could amount to "an intervening change in the law," and indeed can change the

²⁶ See supra at 34 for Under Secretary Carver's contemporaneous criticism of the Barry opinion.

law retroactively. Mr. Barry disagreed on acreage limitation questions with three of his predecessors, Messrs. Finney, Cohen and Bennett, and Barry himself was in effect overruled in 1971 by Solicitor Melich when the latter recommended that Judge Turrentine's decision not be appealed. Did the law change with each opinion, and, if so, back to what date?

(2) Ivanhoe. The second of the ex post facto "developments" invoked by the Solicitor General to erase res judicata from Hewes is this Court's 1958 decision in Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958). S.G. Br. 73. But his characterization of this case as one "which explicated, in the context of a confirmation proceeding, the excess-acreage limitation and its effects on water rights vested under state law" is dead wrong. In Ivanhoe there was no Project Act requiring delivery of water to satisfy present perfected rights, and not a cupful of such rights to satisfy.

Ivanhoe is cited by the Solicitor General 8 times and by Respondents 16 times. It is the foundation of their case, but it is not on point. Ivanhoe had nothing to do with vested water rights. The Act of August 26, 1937, 50 Stat. 844, authorizing the Central Valley Project, pointedly omitted any requirement that the Secretary satisfy present perfected rights, although § 2 of the act tracked § 6 of the Project act in other respects." Ivanhoe dealt solely with the question of whether or not the United States might require compliance with § 5 of the 1902 Reclamation Act in con-

²⁷ Nevertheless, as shown *supra* at 36, Secretary Udall exempted from acreage limitations some 198,000 acres riparian to the Sacramento River, which used water stored by Shasta Dam, in recognition of their preexisting "base rights."

tracts for the sale of water from a federal project to districts which had no rights at all in the streams from which the United States was offering to supply water.²⁸ The holding was in the affirmative: the United States either held title or could acquire title to the water that it proposed to sell, and could condition the sale of this federal property. 357 U.S., at 291, 295.

Two irrigation districts, Ivanhoe and Madera, were involved. As to the Ivanhoe Irrigation District, the Supreme Court said:

"It is interesting to note that irrigators in this district receive water diverted from the San Joaquin in which they never had nor were able to obtain any water right." 357 U.S., at 285.

Madera claimed only: "'[A]n incomplete, incipient and conditional right in the water applied for," in a state law appropriation—a right which the district nevertheless claimed "is vested and runs with the land." 357 U.S., at 287. The Supreme Court rejected that claim. This sort of a right, if it can be called that, is a far cry indeed from a present perfected right, defined in Arizona v. California as a right perfected by "the actual diversion of a specific quantity of water

²⁸ The Court, throughout its opinion, dealt with § 5 of the 1902 Act (as Secretary Wilbur did in our case), not § 46 of the 1926 Act, which it called a "reenactment" of § 5. 357 U.S., at 278 n. 2, 289, 290. Solicitor Krulitz' opinion M-36919, December 6, 1979, said at p. 27:

[&]quot;In Ivanhoe, the Supreme Court essentially adopted the view that section 5 is the fundamental law in the reclamation program and the 1926 Act is merely a procedural modification in how the program is to be carried out."

that has been applied to a defined area of land." 376 U.S., at 341, para. I(G).²⁹

The Court in Ivanhoe construed § 8 of the Reclamation Act of 1902 only with respect to its first clause. the direction that the Secretary conform to state law in the "control, use, or distribution of water used in irrigation," and held that § 5 of the act, rather than state law, controlled the Secretary's distribution of water owned by the United States. The Court did not restrict the vested rights clause in § 8 of the Reclamation Act, i.e., that nothing in that act should be construed as affecting or interfering with any vested right acquired under the laws of a state. To the contrary, it referred to that section as requiring conformity with state law "when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein." 357 U.S., at 291. It did not construe or restrict the provision that the right to the use of water acquired under that act "shall be appurtenant to the land irrigated. and beneficial use shall be the basis, the measure, and the limit of the right." 32 Stat. 390. Indeed, the minority opinion in California v. United States, 438 U.S. 645 (1978), defended Ivanhoe on the ground that the Ivanhoe court had held that "§ 8 dealt only with the acquisition of water rights and required the United States to respect the water rights that were vested under state law (emphasis added)." 438 U.S., at 691, referring to 357 U.S., at 291. This interpretation of Ivanhoe was made in a dissenting opinion which de-

²⁰ Furthermore, as this Court said in *Ivanhoe*, the government's contract provided that "[t]his limitation applies only to 'project water' and previously existing water supplies are unaffected thereby (emphasis added)." 357 U.S., at 285.

fended that decision against the majority's observation that the *Ivanhoe* court "goes further than was necessary" (438 U.S., at 673) and had used "unnecessarily broad language" in restricting the operation of state law (438 U.S., at 676). It should dispel any notion that *Ivanhoe* is authority for a contention that §5 of the Reclamation Act (construed in *Ivanhoe*) or § 46 of the 1926 Act (called a "reenactment" of § 5 by the *Ivanhoe* court), authorizes the Secretary to dishonor rather than "respect the water rights that were vested under state law," and, a fortiori, water rights that this Court has held to have been perfected under both state and federal law.

- (3) This Court's decision and decrees in Arizona v. California. S.G. Br. 73. We are not told how an opinion which held that the Secretary was obligated to deliver water in satisfaction of present perfected rights can now be said to somehow dissolve the state court judgment of 47 years ago, which came to the same conclusion. Dr. Wilbur and the Hewes court called these rights "vested" rights, but they, and this Court in Arizona v. California, were talking about the same thing—rights perfected under state law by the actual application of water to the very lands involved here.
- (4) This Court's opinion in California v. United States, 438 U.S. 645 (1978). This is the fourth reason given for avoiding res judicata. The Solicitor General says that the District relies on this case "to support their view of both the paramount importance of vested rights in this area and the principle of deference under the reclamation law to state policies and procedures." S.G. Br. 73. We do, indeed. But he never makes clear why a decision that emphasizes the "paramount importance of vested rights" under state law constitutes a

reason for unseating the *Hewes* decision, which sustained a contract requiring the Secretary to serve such rights.

In all four respects, the Solicitor General's brief falls far short in its attempted rescue of Dr. Yellen, et al., from the jaws of res judicata, and of the Secretary from the finality resulting from a course of action consistently followed by all Secretaries for more than three decades.

Whatever may be the esoteric escapes from judgments that may be imagined in other cases, a judgment which is required by 43 U.S.C. § 511, and implemented by the government's irrevocable construction of works and the community's irrevocable investments in reliance on the government's promise of "permanent service," is not of that evanescent kind. Otherwise 43 U.S.C. § 511, requiring a validation judgment as a prerequisite to the effectiveness of a contract between the United States and an irrigation district, would be a mockery. If one side could escape its effect by a plea of changed circumstances, so could the other, and the investment of the United States, predicated on the validity of the District's obligations to repay it, would have been built on sand: Conversely, the District's economy, predicated on the government's promise to deliver, permanently, agreed quantities of water through those works, would be forever insecure—a situation perilously close to the present one if the Circuit Court is affirmed.

If the Government prevails in this contention, it will have destroyed all purpose of the validation proceeding, except to make validation a trap for the unwary. The purpose of 43 U.S.C. § 511 is to put these matters at rest. Validation is the strongest judicial medicine known to the law to achieve finality.

Solicitor General Griswold put it cogently:

"One of the arguments frequently made by the government is that of the importance of administrative determinations, particularly those contemporaneously made by the officers charged with the administration of the statute involved. This is familiar doctrine in the tax field, and it has long been applied in many other areas of the government. Moreover, there is a further doctrine. Good government requires a substantial measure of stability. There needs to be a basis for reliance on positions taken by responsible administrative officers. Here the position had been outstanding for 34 years before the present suit was filed. Although I make no suggestion that the statute of limitations applies in this case, the usual period of the statute of limitations with respect to real property is 20 years. There is reason behind such provision."

Respectfully submitted,

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March 18, 1980

APPENDIX



APPENDIX A

Memorandum of Solicitor General Erwin N. Griswold, April 8, 1971 (Congressional Record, February 20, 1980, p. S1632-33, daily edition).

Office of the Solicitor General,

Washington, D.C., April 8, 1971.

MEMORANDUM FOR THE FILES

Re United States v. Imperial Irrigation District, et al., No. 67-7-T, S.D. California.

I have concluded not to authorize an appeal in this case.

Since this conclusion is contrary to the recommendation of Assistant Attorney General Kashiwa of the Lands Division, and is contrary to the recommendations of three members of my own staff, it is incumbent on me to write this memorandum expressing the reasons for my conclusion. The Solicitor of the Department of the Interior has recommended against appeal, although he gives no reasons for his conclusion.

It is also appropriate to note that various types of pressures have been circulating about including items received in the mail, columns by Jack Anderson, and others. With great care, and to the best of my ability, I have tried to be indifferent to these pressures, and to decide the question (which it is my duty to decide) strictly on the merits. I have tried to approach the problem as a lawyer, and as a Solicitor General, responsible on this matter at this point for the sound administration of justice and of governmental action.

^{*} The appendix to the District's Petition for Certiorari contained 248 pages, ending with page "248a"; the pagination of this appendix to the District's Reply Brief therefore begins with page 249a.

- 1. Irrigation in the Imperial Valley was originally a private enterprise. On this basis, the Valley grew and developed. By the early 1920's, the irrigated area had reached virtually its full extent.
- 2. The Boulder Canyon Project Act did not make possible the reclamation of any appreciable amount of land in the Imperial Valley. The land had already been reclaimed. The Boulder Canyon Project Act, by providing for the All American Canal, did provide for a more stable water supply for the Valley, by eliminating the risks of taking the water through Mexico; and it provided protection against the considerable risk of flooding with which the Valley had long been threatened. There is no doubt that this was a benefit to the Valley. Except in a very broad sense, though, it did not amount to reclamation. It helped to protect reclamation which had already occurred under private enterprise, but it did not make possible the cultivation of any appreciable number of additional acres.
- 3. Of great importance is the fact that there were already large land holdings in the Imperial Valley at the time the Boulder Canyon Project Act was adopted. By the late 1920's, the Valley had for many years been probably the most intensively farmed area in the United States. It was, indeed, the source of a large amount of fresh produce marketed all over the country. Much of this was produced on large land holdings. The Imperial Valley had never been a "homesteading" area. It had long been an area where large scale farming was conducted although there were some smaller farms, too.
- 4. It may well be that Congress could have provided that the improvement resulting from the construction of the All American Canal should be made only on condition that all large holdings be broken up, and that land holdings thereafter be limited to 160 acres. There is certainly nothing in the statute which says this expressly. As I have already indicated, the situated was not akin [sic] to the usual recla-

mation project, which brings new land into cultivation, and can appropriately provide that its benefits should be widely shared among small land holders. Here the Imperial Valley was already well established, and functioning on a very large scale, with many large holdings. It is, it seems to me, a rather different thing to say that large holdings must be broken up than it is to say that large holdings shall not be formed in a new development.

- 5. I recognize fully that arguments can be made on the basis of the statutory provisions, particularly those referring to "the reclamation laws," that the proper construction of what Congress did is that land holdings in the Imperial Valley should be reduced to 160 acres, in effect, retroactively. Arguments can be made the other way, too. On either basis, the arguments are extremely technical and complex. Neither conclusion can be said, in my judgment, to be clear or "required" as a matter of ordinary principles of statutory construction.
- 6. Similarly, the legislative history is far from clear, but can be read to provide support for either view. There are clear statements in the legislative history that the 160 acre limit was not involved. These are included in the opinion of the district court. Similarly, there are explicit statements in the legislative history (referred to in Mr. Kashiwa's memorandum) to the contrary. Actually, though, the entire legislative history is extremely complex. It is very hard to have any conviction that any of these items of legislative history have any close relation to the statute as it was finally enacted. The one thing that can be said about the statute passed by Congress is that it contains no express provision on this question and that the arguments that can be made about it, by reference to other statutes, and so on, are complex, and not very convincing.
- 7. In this situation, we have what seems to me to be the determinative factor in this case. This is the announcement made by the Secretary of the Interior, Ray Lyman Wilbur

in February, 1933. This was to the clear effect that the 160 acre limitation was not applicable in the Imperial Valley, for the reason that no new water was being sold under the All American Canal project.

This was a clear and specific administrative determination, contemporaneously made, by the officers charged with the administration of this statute. As far as I can determine, it did not cause a ripple at the time, and it was not seriously questioned in Congress, or elsewhere. Indeed, there was a local court decision confirming it. I do not put much stress on that, but it is a part of the picture which shows that this question was determined in 1933, that it was long regarded as settled, and that many actions were taken in reliance on it.

One of the arguments frequently made by the government is that of the importance of administrative determinations, particularly those contemporaneously made by the officers charged with the administration of the statute involved. This is familiar doctrine in the tax field, and it has long been applied in many other areas of the government. Moreover, there is a further doctrine. Good government requires a substantial measure of stability. There needs to be a basis for reliance on positions taken by responsible administrative officers. Here the position had been outstanding for 34 years before the present suit was filed. Although I make no suggestion that the statute of limitations applies in this case, the usual period of the statute of limitations with respect to real property is 20 years. There is reason behind such provision.

It is said that the action by Secretary Wilbur in February, 1933, was taken in the dying days of the Hoover administration, and therefore, for some reason, is not entitled to great weight. These were, however, the officers who had been responsible for the construction of the Hoover Dam, and who had carried out all of the negotiations under the Boulder Canyon Project Act, and particularly those with respect to the All American Canal. They were the ones

who were then charged with the administration of these statutes. It is hard for me to think of officers who would have been better qualified to know what the appropriate resolution of this problem was. Moreover, they could well have felt that it was not fitting to let such a matter go over to the new administration, since they were directly responsible for it, and had the experience to deal with it.

On this matter, it seems to me significant, too, that no steps were taken by the immediately succeeding administration to upset the determinations made in February, 1933. If there had been serious doubts about this, it seems clear that they would have been raised in the Franklin D. Roosevelt administration. If prompt doubts had been raised, we would not have a long continued administrative construction, and the situation today would be very different. But the initial questions were raised about this only in the mid 1940's, and only with reference to another valley served by the project. Application to the Imperial Valley was soon denied, and no action was taken which directly opposed the conclusion of Secretary Wilbur in the Imperial Valley until the opinion of the Solicitor of Interior on December 31, 1964.

This was more than 31 years after Secretary Wilbur's determination. Whether there was any political motivation in this, I do not regard it as relevant. The significant thing, it seems to me, is that the prior determination had then been outstanding for 31 years, had been widely understood and accepted, and had been extensively relied upon.

8. To me, the essence of this case is essentially a question of good administration of the government. Is it sound to have a government system in which official determinations are made, on questions which are at least debatable, are then outstanding for more than 30 years, and are then decided another way by a succeeding governmental official? This does not strike me as good administration, or good government. Of course, life is filled with uncertainties, in-

cluding commercial life and the ownership of property. But one of the functions of government is to provide for stability and to make it possible for the people to rely on situations which have been determined, and where they make commitments on the basis of that determination.

To me, the controlling factor in this case is the determination of Secretary Wilbur in February, 1933. This was later confirmed by Secretary Krug in 1948. I do not think that it is sound, 38 years later, to be presenting serious questions about that action. Whether it was right or wrong, it was made; and such an administrative determination, on a question at least doubtful should be sustained after a lapse of 38 years.

9. I have given careful consideration to the question whether, agreeing that the underlying questions here are arguable, an appeal should not be authorized simply for the purpose of obtaining a decision of an appellate court on an obviously important matter. Indeed, that would be the easy way out; and it has been tempting. I have given consideration to the question whether I am leaning over backwards. However, I have come to the conclusion that it is not appropriate for me, on this matter, simply to say that it is a doubtful question, and so it should be decided by the court of appeals.

The responsibilities of the Solicitor General cannot be described in a few words. If he authorized appeals in every case where the question was doubtful, a great many more government appeals would be taken than in fact are taken. It is very clear that the Solicitor General is an advocate and not a judge. However, he is a very special sort of advocate. He has a responsibility with respect to government litigation, and he is expected to exercise some control over it, so that cases are not presented simply for the purpose of getting a decision. He has some responsibility in some cases to see that cases are not presented which should not be presented, that cases are not presented where the gov-

ernment's position is, on his best analysis, not one which the government should be interested in.

For the reasons I have already given, this seems to me to be such a case. No matter where I look and turn, I cannot get away from the administrative decision which was made, by officers having responsibility in the area, in February 1933, now 38 years ago. I would not say that it is a breach of faith or a breach of trust for the government to seek to change that decision. I have concluded that, in my judgment, it simply is not good government and that it is not a position which, in the particular circumstances of this case, the United States should be advancing before a court.

In summary, it is not just that I think an appeal to the Ninth Circuit Court of Appeals would be unsuccessful, but that I think that it ought to be unsuccessful. In such circumstances, it does not seem to me appropriate to authorize an appeal.

10. It is clear that there are many defects in the opinion of the district court in this case. It misquotes the statute, and makes other errors. I do not think, though, that these are really very significant. In particular, I do not think that they have the significance which is attached to them in the long memorandum from Mr. Kashiwa. It remains the fact that there is nothing really explicit in the statute, and that the statutory provisions require a good deal of rather involved reading together to support the government's position—a reading together which essentially ignores the special and unusual situation and background of the All American Canal project.

The opinion likewise has some rather sweeping language which might be regarded as having some general effect on the application of the reclamation laws to other projects. It is suggested that there should be an appeal for the purpose of getting this language qualified or disapproved, even if the appeal did not lead to any different result with re-

spect to the Imperial Valley. I am not able to conclude that this is an adequate basis for an appeal. In the first place, these portions of the opinion of the district court are dictum at most, with respect to other projects, and they are rather clearly dictum. I do not think that the precedent will be of any serious moment in subsequent cases involving other areas with different histories and backgrounds. In the second place, I do not think it is appropriate to take an appeal simply for the purpose of getting an opinion limited or corrected, if we think the court reached the right result. Since I think the court here did reach the right result, because of the long continued administrative practice, I do not think that the undue breadth of the opinion is an adequate basis for appeal.

11. In reaching this conclusion, I have sought to consider only the merits of the controversy, and to focus my examination on the responsibilities of this office for the proper handling of government litigation.

For the reasons indicated, however, after full and careful consideration, I have come to the conclusion that there should be no appeal in this case.

Erwin N. Griswold, Solicitor General.

APPENDIX B

Letter of Secretary of the Interior Rogers C.B. Morton to Attorney General John N. Mitchell, April 5, 1971 (Congressional Record, February 20, 1980, p. S1632, daily edition).

THE SECRETARY OF THE INTERIOR,

Washington, D.C., April 5, 1971.

Re United States v. Imperial Irrigation District, Civil No. 67-7-T, U.S.D.C. Southern District of California.

Hon. JOHN N. MITCHELL,

Attorney General of the United States, Department of Justice, Washington, D.C.

DEAR JOHN: I have reviewed the facts and circumstances of the above captioned case as well as the memorandum decision by the United States District Court with my Solicitor, Mitchell Melich. Additionally, we have conferred on the matter with Deputy Attorney General Kleindienst.

They are both of the opinion that an appeal should not be taken in this case and I fully concur with this view. Therefore, I recommend that the United States not appeal the decision of the U.S. District Court, to the U.S. Court of Appeals.

Yours sincerely,

ROGERS C. B. MORTON.

APPENDIX C

Letter of Mitchell Melich. Solicitor, Department of the Interior, to Attorney General John N. Mitchell, April 5, 1971 (Congressional Record, February 20, 1980, p. S1632, daily edition).

U. S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., April 5, 1971.

Re United States v. Imperial Irrigation District, Civil No. 67-7-T, U.S.D.C. Southern District of California.

Hon. JOHN N. MITCHELL,

Attorney General of the United States, Department of Justice, Washington, D.C.

DEAR MR. ATTORNEY GENERAL: On January 7, 1971, Assistant Attorney General Shiro Kashiwa asked for the Department of the Interior's recommendation for or against an appeal from the United States District Court's judgment entered February 9, 1971, in the subject action, holding that the land limitation provisions of reclamation law do not apply to privately owned lands in Imperial Irrigation District.

I have reviewed the memorandum opinion of Judge Turrentine dated January 5, 1971, and the entire factual background which gave rise to this case. Under the circumstances this Department recommends that an appeal not be taken, of the trial court's decision, to the Ninth Circuit Court of Appeals.

Also, I have reviewed this case with Deputy Attorney Kleindienst and he concurs in this recommendation that no appeal be taken.

Sincerely yours,

MITCHELL MELICH, Solicitor.

APPENDIX D

Excerpts From Arizona v. California Concerning Satisfaction of Present Perfected Rights

373 U.S. 566-567

"Further, in several places the Act refers to terms contained in the Compact. For example, ... § 6 requires satisfaction of 'present perfected rights' as used in the Compact. To Obviously, therefore, those particular terms, though originally formulated only for the Compact's allocations of water between basins, are incorporated into the Act and are made applicable to the Project Act's allocation among Lower Basin States. The Act also declares that the Secretary of the Interior and the United States in the construction, operation, and maintenance of the dam and other works and in the making of contracts shall be subject to and controlled by the Colorado River Compact."

373 U.S. 566, n. 37

"The dam and reservoir shall be used among other things for 'satisfaction of present perfected rights' in pursuance of Article VIII of said Colorado River Compact."

373 U.S. 581

"[W]e are persuaded that had Congress intended so to fetter the Secretary's discretion [by requiring him to respect the rights of prior appropriators] it would have done so in clear and unequivocal terms as it did in recognizing 'present perfected rights' in § 6."

373 U.S. 582, n. 83

"... [T]he Senator [Johnson] at another point in the colloquy with Senator Walsh said that he doubted if

the Secretary either would or could disregard Los Angeles and contract with someone having no appropriation. *Ibid*. It is likely, however, that Senator Johnson was talking about present perfected rights, as a few minutes before he had argued that Los Angeles had taken sufficient steps in perfecting its claims to make them protected. See *id*., at 167. Present perfected rights, as we have observed in the text, are recognized by the Act. § 6."

373 U.S. 583, n. 84

"At one point Senator Hayden seems to say that the Secretary's contracts are to be governed by state law:

"The only thing required in this bill is contained in the amendment that I have offered, that there shall be apportioned to each State its share of the water. Then, who shall obtain that water in relative order of priority may be determined by the State courts.' *Ibid*.

"But, in view of the Senator's other statements in the same debate, this remark of a man so knowledgeable in western water law makes sense only if one understands that the 'order of priority' being talked about was the order of present perfected rights—rights which Senator Hayden recognized, see id., at 167, and which the Act preserves in § 6."

373 U.S. 584

"And, as the Master pointed out, Congress set up other standards and placed other significant limitations upon the Secretary's power to distribute the stored waters. It specifically set out in order the purposes for which the Secretary must use the dam and reservoir . . . [here the court quotes from § 6].

373 U.S. 584

"In the construction, operation, and management of the works, the Secretary is subject to the provisions of the reclamation law, except as the Act otherwise provides. § 14. One of the most significant limitations in the Act is that the Secretary is required to satisfy present perfected rights, a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective. § 6."

373 U.S. 588

"Section 18 plainly allows the States to do things not inconsistent with the Project Act or with federal control of the river, for example, regulation of the use of tributary water and protection of present perfected rights."

373 U.S. 594

"It will be time enough for the Courts to intervene when and if the Secretary, in making apportionments or contracts, deviates from the standards Congress has set for him to follow, including his obligation to respect 'present perfected rights' as of the date the Act was passed."

373 U.S. 600

"We follow it [Winters v. United States, 207 U.S. 564 (1908)] now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act became effective on June 25, 1929, are 'present perfected rights' and as such are entitled to priority under the Act."

The decree in Arizona v. California (376 U.S. 340), contains a number of references to present perfected rights.

376 U.S. 341

- "I. For purposes of this decree
 - "(G) 'Perfected right' means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works . . .;"

376 U.S. 341

"(H) 'Present perfected rights' means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act;"

376 U.S. 341

- "II. The United States, its officers, attorneys, agents, and employees be and they are hereby severally enjoined:
- "(A) From operating regulatory structures controlled by the United States and from releasing water controlled by the United States other than in accordance with the following order of priority:
- "(1) For river regulation, improvement of navigation and flood control;
- "(2) For irrigation and domestic uses, including the satisfaction of present perfected rights"

376 U.S. 342-343

"(B) From releasing water controlled by the United States for irrigation and domestic use in the States of Arizona, California and Nevada, except as follows:

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"(3) If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumption use of 7,500,000 acre-feet in the aforesaid three States, then the Secretary of the Interior, after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines and after consultation with the parties to major delivery contracts and such representatives as the respective States may designate, may apportion the amount remaining available for consumptive use in such manner as is consistent with the Boulder Canyon Project Act as interpreted by the opinion of this Court herein, and with other applicable federal statutes, but in no event shall more than 4,400,000 acre-feet be apportioned for use in California including all present perfected rights "

376 U.S. 344

"[A]nd provided further that nothing herein shall prohibit the United States from making future additional reservations of mainstream water for use in any of such States as may be authorized by law and subject to present perfected rights and rights under contracts theretofore made with water users in such State under Section 5 of the Boulder Canyon Project Act or any other applicable federal statute...."

376 U.S. 346

"Provided, further, that consumptive uses from the mainstream for the benefit of the above-named federal establishments shall, except as necessary to satisfy present perfected rights in the order of their priority dates without regard to state lines, be satisfied only out of water available, as provided in subdivision (B) of this Article, to each State wherein such uses occur

439 U.S. 419, 429

"The United States of America, Intervenor, State of Arizona, Complainant, the California Defendants (State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, County of San Diego), and State of Nevada, Intervenor, pursuant to Art VI of the Decree entered in the case on March 9, 1964, at 376 US 340, and amended on February 28, 1966, at 383 US 268, have agreed to the present perfected rights to the use of mainstream water in each State and their priority dates as set forth herein. Therefore, it is hereby OR-DERED, ADJUDGED, AND DECREED that the joint motion of the United States, the State of Arizona. the California Defendants, and the State of Nevada to enter a supplemental decree is granted and that said present perfected rights in each State and their priority dates are determined to be as set forth below

"The Imperial Irrigation District in annual quantities not to exceed (i) 2,600,000 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901."

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